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Supreme Court, U.S.
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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

D.F.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals departed from this Court's decision in *Miller* v. *Fenton*, 474 U.S. 104 (1987), by applying a clear error rather than a *de novo* standard of review to the district court's determination that respondent's confessions were involuntary, in violation of the Due Process Clause of the Fifth Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 63 F.3d 671. The decision and order of the district court (App., *infra*, 34a-70a) is reported at 857 F. Supp. 1311. The report and recommendation of the magistrate judge (App., *infra*, 71a-92a) is reported as an appendix to the decision of the district court at 857 F. Supp. 1327.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1995. The petition for rehearing was denied on November 17, 1995. App., *infra*, 93a. On February 6, 1996, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states, in relevant part: "[N]o person shall be * * * deprived of life, liberty, or property, without due process of law."

STATEMENT

In the United States District Court for the District of Wisconsin, respondent D.F., a juvenile, was charged with two counts of juvenile delinquency for the commission of acts that would constitute second degree murder if committed by an adult, in violation of 18 U.S.C. 1111, 1153, and 5031. Following a hearing, a magistrate judge recommended suppression of respondent's statements made to mental health workers on grounds of privilege. The district court ordered the statements suppressed, not on grounds of privilege, but based on its conclusion that the use of the statements at trial would violate the Constitution. App., *infra*, 69a. Applying a clear error standard of review, the court of appeals affirmed the district court's ultimate determination that respondent's admissions to therapists in a county mental health treatment center that she killed her two infant cousins were involuntary within the meaning of the

Due Process Clause of the Fifth Amendment. *Id.* at 31a-33a.

1. In 1992, respondent was 12 years old and lived on an Indian reservation in Wisconsin in the legal custody of her aunt. On January 5, 1992, respondent's one-year-old cousin was found dead. Six days later, her two-year-old cousin was also found dead. The deaths were initially attributed to Sudden Infant Death Syndrome and Influenza A. It was later determined, however, that the deaths could have been caused by external suffocation. App., *infra*, 2a, 34a, 71a.

Respondent had a history of assaultive behavior and drug and alcohol abuse; there is also evidence that she had suffered physical and sexual abuse during her childhood. On August 17, 1992, an Indian tribal court ordered respondent's aunt to seek mental health services for respondent. The county Department of Social Services recommended that respondent be placed in the county Mental Health Center. On December 4, 1992, respondent's aunt voluntarily committed her to the Center; respondent herself played no role in the admission decision. App., *infra*, 2a-3a, 36a-37a, 73a.

Respondent remained at the Center until May 1993, where she lived in a ward for adolescents and participated in a residential treatment program. Respondent had freedom of movement within the ward and to other buildings for school and meals. The ward itself, however, was locked, screens secured its windows, and patients had to be escorted when they left the locked area. All patients were observed by staff at least hourly. Patients who left the Center, with or without permission, were strip searched for contraband upon their return. On the one occasion when respondent ran away from the Center, she was returned by the police the next day. App., *infra*, 3a-4a, 40a, 73a.

While at the Center, respondent was under the care of a treatment team that included a psychiatrist, a social worker, a registered nurse, and other therapists. The plan of treatment included a point system for administering privileges and punishment to encourage good behavior and program participation. Patients at the lowest level ("base zero") were confined to their rooms, wore only hospital gowns and no shoes, and were forbidden to talk to other patients. Those at higher levels were allowed to wear their own clothes, move about the Center, and interact with others as they wished. Patients were encouraged to talk and to write about their problems. They could earn or lose points, and thereby move up or down levels, depending on whether they engaged in open and honest discussion with staff members and family about their problems. For example, points could be gained by initiating conversations with the assigned staff member at least once a shift, answering questions, writing in journals, and participating sincerely in group therapy sessions. App., *infra*, 4a, 37a, 40a-41a, 76a. "Because of her behavioral problems and her problems with mistrust of authority, [respondent], in particular, had a care plan specially designed to encourage her to address anger issues by speaking frankly about the abuse she had inflicted on other children." *Id.* at 41a. While at the Center, respondent was given psychotropic medications, including Thorazine, Ativan, and Zoloft. *Id.* at 4a.

By mid-December 1992, staff at the Center were aware that respondent was a suspect in the deaths of her cousins. After reviewing state-law reporting requirements, the staff repeatedly informed respondent that "any statements she made about abuse of other children would have to be reported." App., *infra*, 39a, 43a-44a, 74a. At the same time, Center staff also sought to develop respondent's trust in them. They encouraged her to speak openly about any harm she had caused to other children. They asked her directly whether she had ever murdered anyone, and told her to make a list of all the people she had ever harmed. *Id.* at 4a-5a, 41a, 44a, 74a, 75a. Many staff members encouraged respondent to talk about her past actions solely out of a belief that it was essential to her therapy and eventual recovery. *Id.* at 43a. Other staff members took the view "that [respondent] would not recover unless and until she took responsibility for her wrongs and was held accountable for them, in a court of law if necessary." *Id.* at 43a, 85a.

At first, respondent did not discuss her past assaultive behavior. She told a staff member that she could not talk with staff "because of staff's reporting requirements." App., *infra*, 40a. Respondent's aunt told a Center socialworker that respondent had said that if all were known about what respondent had done, respondent believed she would "go to jail for a long time." *Ibid.* In January 1993, however, respondent admitted abusing three of her cousins. Respondent signed a release to permit disclosure of those admissions, and they were reported to social service authorities. She was not prosecuted for the assaults. In March, Center staff told her that the State had made a tentative decision to "shelve" any charges arising out of those admitted abuses, and that no harm would come to her as a result of those admissions as long as she continued to make progress in her treatment. App., *infra*, 6a, 42a, 74a-75a.

On April 5, 1993, respondent, then 14 years old, admitted in a group therapy session to having killed her cousins. The juveniles in the group were discussing serious things they had done in the past. After one juvenile disclosed an incident and was being encouraged by the others to be more frank, respondent stated, "Oh, you think what you did was bad, let me tell you what I did," following which she described the details of her cousins' deaths. App., *infra*, 44a, 76a. Several hours later, she told another staff member about the murders, and said that she was relieved finally to talk about them because the secret had been "eating her up." *Id.* at 8a. The next day, the group therapist told the treatment team about respondent's confession. A liaison from the Department of Social Services who was present at the meeting immediately called Child Protective Services and reported the confession. *Id.* at 8a, 44a-45a, 75a-77a.

An FBI investigation ensued. The treatment team at the Center had some uncertainty about whether respondent's admission should have been disclosed to child protective services. In an April 16, 1993, telephone call from an FBI agent, respondent's social worker at the Center expressed those uncertainties. Later that day, the social worker was told by the Center's administrative staff and counsel that disclosure was permitted but not required by the state child abuse laws. After being told that cooperation with the FBI was appropriate, the social worker decided to do so. Respondent, who apparently was not informed of the social worker's cooperation, was encouraged by the staff in therapy sessions to elaborate on her role in her cousins' deaths. On April

22, an appointed attorney advised respondent not to speak with anyone about her confessions, and she signed a statement invoking her Fifth Amendment right against compulsory self-incrimination. Respondent's social worker told the attorney that group therapy sessions were "confidential." Respondent repeated her confessions nine more times, including at family therapy meetings on April 14, April 23, and May 10, 1993. App., *infra*, 8a, 42a, 45a-48a.

2. a. The United States charged respondent under the Juvenile Delinquency Act, 18 U.S.C. 5031 *et seq.*, with two counts of juvenile delinquency for acts that would constitute murder in the second degree if committed by an adult, in violation of 18 U.S.C. 1111 and 1153. Respondent moved to suppress her statements on the grounds that they were made in violation of her Fifth Amendment privilege against compulsory self-incrimination and the Due Process Clause. App., *infra*, 9a. The magistrate judge determined that respondent was not in custody for *Miranda* purposes, *id.* at 90a, but recommended that the motion to suppress be granted on the ground that the confessions were protected from disclosure by a state-law psychotherapist-patient privilege, *ibid.*[1] The magistrate judge did not make a recommendation

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[1] The magistrate judge applied the psychotherapist-patient privilege notwithstanding that respondent had been warned that statements that she had harmed others would be reported. As the magistrate interpreted it, the privilege protected the statements from disclosure unless the patient intended that they be reported. The court found that respondent's intent was "therapeutic, not to have the information conveyed to the police, but to demonstrate to the staff that she was developing trust in them." App., *infra*, 82a.

regarding whether the confessions were involuntary in violation of due process. See *id.* at 77a-89a.

b. The district court reviewed the recommendation *de novo* pursuant to 28 U.S.C. 636(b)(1)(C) and granted the suppression motion, not on the recommended ground, but because he believed that the confessions were constitutionally involuntary. App., *infra*, 63a-70a.[2] "[A] confession will be adjudged 'voluntary' if the government demonstrates that under the totality of the circumstances and by a preponderance of the evidence that it was not secured through psychological or physical intimidation but rather was the 'product of a rational intellect and a free will.'" *Id.* at 63a (citations omitted).

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[2] The district court rejected the magistrate's reliance on the psychotherapist-patient privilege. App., *infra*, 48a-59a. Applying a case-by-case "interest balancing" approach to the privilege, the court concluded that, because respondent's participation in therapy was compelled and she knew Center staff members had reporting obligations, disclosure of respondent's statements "would not significantly impact utilitarian or privacy interests." *Id.* at 57a-58a. Nondisclosure, in contrast, "would seriously impact Government law enforcement interests as well as the truth-seeking process that is an integral part of our justice system." *Id.* at 59a. The existence and scope of a federal psychotherapist-patient privilege is now before the Court in *Jaffee* v. *Redmond*, No. 95-266. We agree with the district court, App., *infra*, 55a n.22, that under the "definitional" or "categorical" approach that we advocate, respondent's statements are not privileged, see *Jaffee*, U.S. Br. at 20-21, 26; cf. Wis. Stat. Ann. § 905.04(1)(b) (West 1995).

The district court also stated that it would "not decide this case on *Miranda* grounds." App., *infra*, 62a. The court noted that *Miranda* is a "bright-line prophylactic rule" designed to govern police conduct, and that "[c]ourts have been reluctant to expand the *Miranda* requirements to questioning by officials outside the law enforcement community." *Id.* at 61a-62a. That reluctance was well-founded here, in the court's view, in the absence of "any widespread pattern of overreaching by mental health officials seeking to elicit confessions." *Id.* at 62a.

The court held that, although a confession cannot be deemed involuntary in the absence of coercive government action, law enforcement personnel are not the only government actors who may engage in such conduct. App., *infra*, 64a-66a (citing *Colorado* v. *Connelly*, 479 U.S. 157 (1986)). The court determined that "[c]learly, this case involves coercion—indeed, a bit of overreaching—by government employees." App., *infra*, 67a. The court stated:

> Staff members at the Center were either enlisted or volunteered to act as law enforcement surrogates in eliciting confessions from troubled teens. There is extensive evidence in the record of the close relationship between staff at the Center and Protective Services, the juvenile court system, and the F.B.I. There is also evidence that many of the staff at the center saw themselves as an arm of law enforcement.

Ibid.

The district court then examined "the characteristics of the accused and the details of the interrogation" to determine whether the confessions were voluntary. App., *infra*, 67a (quoting *United States* v. *Montgomery*, 14 F.3d 1189, 1194-1195 (7th Cir. 1994)). The court concluded that, "[g]iven the circumstances under which they were employed, the various 'encouragement' techniques employed by the staff were highly coercive. A reasonable person of [respondent's] age, intellect, and mental state would have felt coerced." App., *infra*, 69a. In reaching that conclusion, the court observed that "[t]here is no evidence * * * that [respondent] was ever fully warned of the consequences of a confession," and that "the evidence suggests that the warnings * * * never included any mention of [respondent's] Fifth Amendment privilege against self-incrimination." *Id.* at 68a-69a. The court thus held that respondent's inculpatory statements "were secured through psychological coercion and were not the 'product of a rational intellect and free will.'" *Id.* at 69a.

3. The court of appeals, following its holding in *United States* v. *Baldwin*, 60 F.3d 363 (1995), applied a clear error standard of review to the district court's determination that respondent's confessions were involuntary. App., *infra*, 12a-13a. The panel in *Baldwin* expressly overruled circuit precedent that had embraced the "conventional standard" of *de novo* appellate review of voluntariness determinations. *Baldwin*, 60 F.3d at 364. In so doing, the court distinguished this Court's decision in *Miller* v. *Fenton*, 474 U.S. 104 (1987), which required independent, plenary review of the question whether a confession was voluntary, on the ground that *Miller* involved federal habeas review of a state-court decision, rather than direct review of the decision of a federal district court. 60 F.3d at 364. The court identified three reasons that, in its view, favored the clear error standard: (1) the trial judge is "closer to the facts" and therefore "knows more about the premise to which the legal standard * * * is to be applied"; (2) the trial judge is "more practiced than appellate judges in assessing the significance of facts"; and (3) *de novo* review is not necessary to produce legal uniformity since "the legal standard is a given and only its application to a particular and

perhaps unique set of facts is in question." *Baldwin*, 60 F.3d at 365.

Under a clear error standard, the court of appeals affirmed the district court's holding that respondent's confessions were involuntary. App., *infra*, 18a-33a. The court held that "the district court was correct insofar as it believed that, in assessing the voluntariness of a confession, the holding of [*Colorado* v.] *Connelly*[, *supra*,] does not restrict the protection of the Fifth Amendment's Due Process Clause to the actions of 'law enforcement personnel.'" *Id.* at 20a. The court of appeals stated, however, that "although a government employee need not be a law enforcement official for his questioning to implicate the strictures of the Fifth Amendment, his questioning must be of a nature that reasonably contemplates the possibility of criminal prosecution." *Id.* at 27a-28a.

The court of appeals concluded that "whatever our own judgment might have been had we sat as trial judges in this case, a respect for the division of roles assigned to the trial and appellate benches requires that we not disturb the district court's conclusion that the medical staff at the Center saw the prosecution of [respondent] as a part of their work. Although the evidence is not at all one-sided, we cannot say that the court was clearly erroneous." App., *infra*, 31a. The court also relied on the clear error standard in affirming the district court's "conclusion that [respondent's] inculpatory statements were not the product of a rational intellect and a free will." *Id.* at 32a (quotation marks omitted). The court of appeals observed that the district court had reviewed "the efforts of the [center's] staff to gain [respondent's] trust, the systems of rewards and sanctions that were imposed, the absence of any comprehensive warning as to the full consequences of [respondent's] disclosure, and the absence of any mention of her right against self-incrimination." *Ibid.* The court concluded: "We cannot say, given the standard of review to which we must adhere, that [the district court's] conclusion is clear error." *Ibid.* "Nor can we say," the court added, "that the district court was in error in its conclusion that the subsequent confessions of [respondent] were inadmissible because they were the result of continued staff pressure." *Ibid.*

The court denied the United States' petition for rehearing and suggestion for rehearing en banc. App., *infra*, 93a.

REASONS FOR GRANTING THE PETITION

The court of appeals, contrary to a long line of decisions of this Court, applied a clear error standard of review in affirming the district court's determination that respondent's confessions that she killed her infant cousins were involuntary, in violation of the Due Process Clause. That decision conflicts with this Court's established rule that the voluntariness of a confession is reviewed by appellate courts under a *de novo* standard—a rule recently reaffirmed in *Miller* v. *Fenton*, 474 U.S. 104 (1987). The court of appeals' decision also conflicts with decisions in every other federal court of appeals. As this Court recognized in *Miller*, this is an issue of "importance to the administration of criminal justice." *Id.* at 109. See also *Baldwin*, 60 F.3d at 367 (Ripple, J., dissenting from the denial of rehearing en banc) ("the standard of review governing the voluntariness of a confession" is "a major issue in criminal procedure"). In view of the significance of the question presented, and the clear, recent decision in *Miller* resolving that question, the petition should be granted and the erroneous decision of the court of appeals summarily reversed.

1. The "voluntariness" of a confession under the Due Process Clause depends on whether, under "the totality of the circumstances," the confession was free from governmental exertion of psychological or physical pressures, and thus the product of rational intellect and free will. *Miller*, 474 U.S. at 111; *Colorado* v. *Connelly* 479 U.S. 157, 164 (1986); *Haynes* v. *Washington*, 373 U.S. 503, 513-514 (1963); App., *infra*, 18a-19a. The Due Process Clause prohibits "interrogation techniques [that], either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned." *Miller*, 474 U.S. at 109.[3] There must be an "essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Connelly*, 479 U.S. at 165. "[W]hile mental condition is surely relevant to an individual's susceptibility to police coercion," it is not determinative. *Id.* at 164. Rather, the analysis "turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Miller*, 474 U.S. at 116. Although a

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[3] See generally *Blackburn* v. *Alabama*, 361 U.S. 199 (1960) ("a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary."); *Brown* v. *Mississippi*, 297 U.S. 278 (1936); 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.2, at 441-449 (1984 & Supp. 1991).

defendant's age is relevant factor, the same due process analysis applies to juveniles. *Haley* v. *Ohio*, 332 U.S. 596 (1948); cf. *Fare* v. *Michael C.*, 442 U.S. 707, 725 (1979).

a. The decision below conflicts with *Miller* v. *Fenton*, *supra*, and a long line of this Court's cases consistent with *Miller*. *Miller* holds that the question whether a confession was voluntary is not a factual issue entitled to a presumption of correctness under the federal habeas corpus statute, 28 U.S.C. 2254(d), but is a legal issue open to independent review in federal court. The Court in *Miller* noted that "[w]ithout exception, the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." 474 U.S. at 110 (citing cases); see *id.* at 112, 113 (requiring "plenary" or "independent" review); *Arizona* v. *Fulminante*, 499 U.S. 279, 287 (1991) (following *Miller*).

Miller is decisive here. *De novo* review of the legal question whether particular interrogation techniques are constitutionally unacceptable comports with the established allocation of decisional responsibilities between the federal district courts and the courts of appeals: Appellate courts "accept[] findings of fact that are not 'clearly erroneous' but decid[e] questions of law *de novo*." *First Options of Chicago, Inc.* v. *Kaplan*, 115 S. Ct. 1920, 1926 (1995); see *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988). While the findings of the underlying facts that surround the issue of voluntariness are reviewed only for clear error,[4] *de novo* review governs the ultimate legal question whether a confession was "obtained in a manner compatible with the requirements of the Constitution." *Miller*, 474 U.S. at 112.

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[4] This Court has defined factual findings as "basic, primary, or historical facts: facts 'in the sense of a recital of external

Miller reaffirmed "the Court's longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry," 474 U.S. at 115, warranting *de novo* consideration. The Court has expressed that position both in collateral and direct review of state decisions and on direct review of federal criminal decisions. For example, in *Davis* v. *North Carolina*, 384 U.S. 737, 739 (1966), the Court on habeas review reversed the admission in evidence of a confession obtained from a suspect held incommunicado in custody for 16 days. The Court acknowledged that factual conflicts "were resolved against Davis by the district court and we need not review those specific findings here." *Id.* at 741. When it reached the ultimate legal issue of voluntariness, however, the Court conducted *de novo* review: "It is our duty in this case * * * as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness. Wholly apart from the disputed facts, a statement of the case from the facts

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events and the credibility of their narrators,'" *Thompson* v. *Keohane*, 116 S. Ct. 457, 464 (1995), quoting *Townsend* v. *Sain*, 372 U.S. 293, 309 n.6 (1963). Thus, "subsidiary factual questions, such as whether a drug has the properties of a truth serum, or whether in fact the police engaged in the intimidation tactics alleged by the defendant," including "the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with *Miranda* warnings," are reviewed only for clear error. *Miller*, 474 U.S. at 112, 116; see *Fulminante*, 499 U.S. at 287.

established in the record, in our view, leads plainly to the conclusion that the confessions were the product of a will overborne." *Id.* at 741-742.

In *Beckwith* v. *United States*, 425 U.S. 341 (1976), this Court embraced the same *de novo* standard of appellate review for determinations of voluntariness made in federal criminal cases that it routinely had applied to state-court decisions. In *Beckwith*, the Court held that *Miranda* warnings were not required before a tax official conducted a non-custodial interview. The Court noted, however, that in "special circumstances," an individual might be able to raise a claim of coercion, and in reviewing whether law enforcement officials' behavior "was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined, * * * it is the duty of an appellate court, including this Court, 'to examine the entire record and make an independent determination of the ultimate issue of voluntariness.'" *Id.* at 347-348 (quoting *Davis*, 384 U.S. at 741-742).[5]

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[5] See also *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) (holding, on direct review of state-court decision admitting confession of suspect interrogated while in hospital intensive-care unit and barely conscious, that "this Court is under a duty to make an independent evaluation of the record"); *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963) (holding, on direct review of decision admitting confession of suspect held incommunicado for 16 hours, that "[i]t is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of *independent* determination here"); *Haley*, 332 U.S. at 599 (holding, on habeas review of decision admitting confession by 15-year-old detained incommunicado for over three days, that "the ruling of the

b. The voluntariness question in *Miller* arose on habeas review of a state-court determination, but the same *de novo* standard of review should apply—and has been applied by this Court—on appeal of federal district court determinations. The court of appeals in *Baldwin*, however, reasoned that, "[s]ince the relation between federal and state courts and the relation between federal appellate and federal trial courts are not symmetrical, the two questions [regarding standard of review] need not be answered in the same way." 60 F.3d at 364. *Baldwin* cannot be reconciled with this Court's precedents, and its reasoning squarely contradicts the reasoning employed in *Miller* itself.

As the cases discussed above demonstrate, this Court has not differentiated between the standard of review of involuntariness claims applicable to state-court and federal-court judgments.[6] *Beckwith, supra*, was a federal prosecution with no state decision at issue. In *Davis, supra*, the federal district court

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trial court and the finding of the jury on the voluntary character of the confession do not foreclose the independent examination which it is our duty to make here"); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 147-148 (1944) (requiring "independent examination" whether 36 hours of continuous questioning by relays of officers was coercive).

[6] *Miller* expressly disavowed any difference between direct and collateral review. *Miller*, 474 U.S. at 110-111 ("many of the early decisions applying the independent-determination rule in confession cases came to the Court on direct appeal from state-court judgments," but the rule of independent review "is no less firmly established in cases coming to the federal system on habeas corpus"). Thus, any reliance in *Miller* on the language and purpose of Section 2254(d) does not detract from that decision's applicability to direct review of either state or federal court judgments.

conducted a fresh evidentiary hearing on federal habeas review; the Supreme Court thus independently reviewed not the determination of a state court, but of the federal district court. Moreover, *Miller* did not rest on a perception that state-court determinations require more searching review; rather, the Court reiterated its "confidence that state judges, no less than their federal counterparts, will properly discharge their duty to protect the constitutional rights of criminal defendants." 474 U.S. at 117. As this Court observed in requiring *de novo* review of determinations of actual malice in the libel context, it would "pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of [the lower] federal courts." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984).[7]

Baldwin's view that trial courts are better situated to resolve voluntariness issues and that appellate courts have little to contribute departs from the reasoning of *Miller*. The court of appeals in *Baldwin* noted that federal district judges are "closer to the facts" and "more practiced than appellate judges in assessing the significance of facts." 60 F.3d at 365.

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[7] See also *Baldwin*, 60 F.3d at 366 (Fairchild, J., concurring on other grounds) ("I have seen no analysis which justifies treating voluntariness as an issue of law when a habeas proceeding is before a district court, but an issue of fact when a court of appeals reviews a judgment of a federal district court."); *United States* v. *Hawkins*, 823 F.2d 1020, 1023 n.1 (7th Cir. 1987) ("We see no reason why *Miller* should not be applicable to the standard of review we use in direct review cases when evaluating the ultimate issue of the voluntariness of a confession.").

The court also voiced the belief that "de novo review is not necessary to produce a reasonable uniformity of the legal principles applied within the court's jurisdiction." *Ibid.* In *Miller*, however, this Court expressly stated that a trial judge "is not in an appreciably better position" than a reviewing court to determine whether a confession "was obtained in a manner consistent with the Constitution." 474 U.S. at 117. Indeed, this Court reaffirmed that view earlier this Term in *Thompson* v. *Keohane*, 116 S. Ct. 457, 465-466 (1995) ("as in the case of the alleged involuntariness of a confession," the trial court's "superior capacity to resolve credibility issues is not dispositive of the 'in custody' inquiry" for *Miranda* purposes). *Miller* thus distinguished the voluntariness of a confession from more fact-bound issues—such as a determination of juror impartiality or a defendant's competency to stand trial—that depend substantially on "assessments of credibility and demeanor" and are reviewable only for clear error. *Miller*, 474 U.S. at 116-117 (citing *Patton* v. *Yount*, 467 U.S. 1025, 1036 (1984); *Maggio* v. *Fulford*, 462 U.S. 111, 117 (1983) (per curiam)).

Also, contrary to *Baldwin*'s reasoning, the *Miller* Court emphasized the "primary function" of the appellate court "as an expositor of law" regarding unconstitutionally coercive government conduct. 474 U.S. at 114; accord *Thompson*, 116 S. Ct. at 466-467 ("'in custody' determinations do guide future decisions"; the "law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law"). Thus, while the Seventh Circuit may have "moved decisively to the position that appellate review of determinations of mixed questions of fact and law should be governed by the standard of clear error, and not by the *de novo* standard," *Baldwin*, 60 F.3d at 365, that move cannot be reconciled with this Court's settled approach in evaluating the voluntariness of a confession.

2. The Seventh Circuit's position also departs from that of the other circuits, each of which applies a *de novo* standard of review to federal district courts' determinations whether confessions were obtained in violation of due process. See, *e.g.*, *United States* v. *Burns*, 15 F.3d 211, 216 (1st Cir. 1994) ("the ultimate issue of voluntariness is a question of law subject to plenary review"); *United States* v. *Anderson*, 929 F.2d 96, 99 (2d Cir. 1991) ("the voluntariness issue presents a legal question that we review *de novo*"); *United States* v. *Bethancourt*, 65 F.3d 1074, 1078 (3d Cir.) ("This court applies plenary review to a district court's determination whether a confession was given voluntarily."), cert. denied, No. 95-7691 (Feb. 26, 1996); *United States* v. *Pelton*, 835 F.2d 1067, 1072 (4th Cir.) ("An appellate court must make an independent determination on the issue of voluntariness."), cert. denied, 486 U.S. 1010 (1988); *United States* v. *Scurlock*, 52 F.3d 531, 536 (5th Cir. 1995) ("The ultimate question of voluntariness is a legal question which we review *de novo*."), citing *United States* v. *Restrepo*, 994 F.2d 173, 183 (5th Cir. 1993); *United States* v. *Rigsby*, 943 F.2d 631, 635 (6th Cir. 1991) (claim that confession was coerced in violation of due process is reviewed "*de novo*"); *United States* v. *Robinson*, 20 F.3d 320, 322 (8th Cir. 1994) ("the voluntariness of a confession is a legal inquiry subject to plenary review by the appellate courts") (quoting *United States* v. *Rohrbach*, 813 F.2d 142, 144 (8th Cir.), cert. denied, 482 U.S. 909 (1987)); *United States* v. *Benitez*, 34 F.3d 1489, 1495 (9th Cir.) ("we review the voluntariness of a con-

fession *de novo*"), cert. denied, 115 S. Ct. 1268 (1995); *United States* v. *Muniz*, 1 F.3d 1018, 1021 (10th Cir.) (regarding claim of coercive interrogation, "[w]e review the court's determination of the ultimate issue of voluntariness *de novo*."), cert. denied, 114 S. Ct. 575 (1993); *United States* v. *Blackman*, 66 F.3d 1572, 1577 (11th Cir. 1995) ("The district court's ultimate conclusion on the voluntariness of a confession * * * raises a question of law to be reviewed *de novo*."); but see *United States* v. *Mendoza-Cecilia*, 963 F.2d 1467 (11th Cir.), cert. denied, 506 U.S. 964 (1992); *United States* v. *Yunis*, 859 F.2d 953, 958 (D.C. Cir. 1988) (regarding waiver of *Miranda* rights, "the ultimate determination of voluntariness and waiver, *vel non*, * * * is for this court to make") (quoting *United States* v. *Poole*, 495 F.2d 115, 121 (D.C. Cir. 1974) (applying same rule to claim that confession was involuntary), cert. denied, 422 U.S. 1048 (1975)). Indeed, the Seventh Circuit acknowledged in *Baldwin* that "[t]he conventional standard for appellate review of determinations of the voluntariness of a statement * * * is the *de novo* standard." 60 F.3d at 364.[8]

3. This Court should intervene to correct the Seventh Circuit's anomalous approach. The Seventh Circuit has twice declined to consider the question *en banc* notwithstanding the difference of opinion within that court regarding the correct standard of review. Compare App., *infra*, 12a-13a, following *United States* v. *Baldwin*, 60 F.3d 363 (7th Cir. 1995) (applying clear-error standard, and acknowledging that "[t]his

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[8] See also *Baldwin*, 60 F.3d at 367 (Flaum, J., dissenting from the denial of rehearing en banc) (recognizing the Seventh Circuit's "apparent desire to be the most proactive court in the country on questions of expanding deferential review").

decision * * * creates an intercircuit conflict"), with *id.* at 366 (Flaum, J., dissenting from the denial of rehearing en banc); *id.* at 367 (Ripple, J., dissenting from the denial of rehearing en banc); *id.* at 368 (Rovner, J., dissenting from the denial of rehearing en banc); *United States* v. *Cichon*, 48 F.3d 269, 275 (7th Cir. 1995) (applying *de novo* standard); *United States* v. *Hawkins*, 823 F.2d 1020, 1022 (7th Cir. 1987) (same). The United States suggested rehearing en banc in this case, and the *Baldwin* panel decided *sua sponte* to poll the court regarding rehearing en banc. 60 F.3d at 365. The court of appeals' refusal to hear en banc either this case or *Baldwin* indicates that court's commitment to its minority position.

In our view, the appropriate disposition of this case is summary reversal. The law governing the standard of review of a voluntariness determination is firmly established by *Miller*—a recent precedent that relied on a consistent course of prior decisions and that has since informed an analogous standard-of-review ruling earlier this Term in *Thompson.* And the need for correction of the court of appeals' error is of paramount importance in federal criminal cases. Confessions play a vital role in law enforcement, as is illustrated by this case. The government acknowledged in the district court that, without respondent's confessions to double murder, the juvenile delinquency charges against her cannot proceed.

The standard of review of the district court's decision that the confessions were involuntary was critical to the court of appeals' holding that the confessions cannot be used. The court of appeals accepted the district court's conclusion that "the medical staff of the Center saw the prosecution of D.F. as a part of their work," stating that "[a]lthough the evidence is not at all one-sided, we cannot say that the court was clearly erroneous." App., *infra*, 31a. Under the *de novo* standard, however, the court of appeals would have had to reach an independent determination whether the Center staff crossed the line between treatment and "coerc[ing] admissions under the guise of treatment." *Id.* at 31a n.20. Accepting the district court's findings of historical fact about what was said and done at the Center, a question of characterization remains of whether law enforcement purposes had anything to do with respondent's "spontaneous[]" disclosure in group therapy that she had killed her cousins, or with her subsequent confessions. *Id.* at 8a. That issue cannot be resolved without considering the court's role in defining the types of government action that, in the circumstances of the case, are incompatible with due process. *Miller*, 474 U.S. at 450. Similarly, without reaching its own judgment on the issue, the court of appeals deferred to the district court's conclusion that not only respondent's original confession, but its elaboration 10 subsequent times, were all involuntary. App., *infra*, 32a. As we have shown, however, it is the "duty of an appellate court * * * to examine the entire record and make an independent determination of the ultimate issue of voluntariness" before excluding a confession as the improper product of coercive government action. *Beckwith*, 425 U.S. at 348 (internal quotation marks omitted). Such a determination is particularly important in a potentially recurring context such as this, where state or local mental health professionals hear confessions to crimes in the context of therapy, and must then determine whether and how to provide that information to the criminal justice system.

Accordingly, this Court should reverse the judgment of the court of appeals, and remand the case for reconsideration under a *de novo* standard of review.[9]

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted.

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[9] There is no need to hold the petition here for the disposition of *Ornelas* v. *United States*, cert. granted, No. 95-5257 (to be argued Mar. 26, 1996). That case presents the question whether a court of appeals, accepting as not clearly erroneous the facts found by the district court, is required to review *de novo* the district court's conclusion that those facts provided reasonable suspicion justifying an investigatory stop and probable cause to search without a warrant. In our brief in *Ornelas*, we argue that a court of appeals should apply a *de novo* standard of review in that context. The Court's decision in *Ornelas* might prompt the Seventh Circuit to abandon its misguided approach to review of coerced-confession claims. We believe, however, that the decision below is so squarely foreclosed by this Court's decisions requiring independent appellate review of coerced-confession claims that summary reversal is the more appropriate course.

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 94-2900

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

D.F., DEFENDANT-APPELLEE

[ARGUED JAN. 5, 1995
DECIDED AUG. 25, 1995
REHEARING AND SUGGESTION FOR
REHEARING EN BANC DENIED NOV. 17, 1995]

Before: RIPPLE and ROVNER, Circuit Judges, and MILLER, District Judge.*

RIPPLE, Circuit Judge.

On January 5, 1992, a one-year-old girl was found dead in her home; six days later her two-year-old sister was found dead there. D.F., a juvenile cousin of the children, was charged, on November 17, 1993, with two counts of second degree murder. *See* 18 U.S.C. §§ 1111, 1153 and 5031. Following a two-day suppression hearing, the magistrate judge recommended that

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* The Honorable Robert L. Miller, District Judge for the Northern District of Indiana, sitting by designation.

D.F.'s statements to mental health workers be suppressed because they were privileged communications. The district court agreed that the statements should be suppressed, but based the suppression on the involuntariness of the statements. The government has appealed that decision. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

A. *Facts*

In 1992, when D.F. was twelve years old, she was living with her aunt on the [redacted] reservation in Wisconsin.[1] On January 5 of that year, her one-year-old cousin was found dead. On January 11 her two-year-old cousin also was found dead. The medical examiner attributed the first death to Sudden Infant Death Syndrome and the second to Influenza A. A second medical examiner determined, however, that the deaths could have been caused by suffocation.

On December 4, 1992, D.F. was admitted, against her will, by her aunt and legal guardian to the county mental health facility, [redacted] Mental Health Center ("Center"). She remained in the Center until

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[1] D.F. is a juvenile. The district court assumed jurisdiction under 18 U.S.C. § 1153, which gives the court jurisdiction over a charge of murder committed by an Indian on a reservation. (We employ the word "Indian" to conform to the statutory language. In our normal usage, we would employ "Native American."). This case is before us under seal. We have redacted the names of persons and places involved, using the same format as did the district court. *See United States v. D.F.*, 857 F.Supp. 1311 (E.D.Wis. 1994).

May 1993. D.F. had a history of assaultive behavior and drug and alcohol abuse; there is also evidence that she had suffered physical and sexual abuse during her childhood. At the time she was admitted, she was under a [redacted] Tribal Court order requiring D.F.'s guardian to seek mental health services for her.[2] The [redacted] County Department of Social Services also had recommended that D.F. be placed at the Center.[3]

D.F. was admitted to a locked ward for adolescents and was placed in the residential treatment program at the Center. Patients' freedom of movement while on the ward was restricted severely. In addition to the doors being locked, there were screens securing the windows and patients had to be escorted when they left the locked area. All patients were observed by staff at least hourly. On the one occasion when D.F. ran away from the Center, she was returned forcibly by the police the next day.

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[2] The [redacted] Tribal Court Order of August 17, 1992, required D.F.'s legal guardian to seek mental services for D.F. and ordered D.F. to complete the counseling. Defendant's Ex. 1. The State of Wisconsin provides services to [redacted] Indians who voluntarily submit to civil commitment. *United States v. Teller*, 762 F.2d 569, 577 n. 5 (7th Cir. 1985) (citing 70 Op. Atty.Gen.Wisc. 219 (1981)).

[3] The government described D.F.'s admission to the Center as "voluntary" because it was approved by her legal guardian (her aunt) and was not court-ordered. D.F. calls her admission "involuntary" because she opposed her guardian's decision to place her at the Center. D.F. asserts that the record bears out the district court's finding that her commitment was involuntary. The district court noted that, although D.F.'s aunt was technically responsible for her admission to the Center, she was heavily influenced by a pending court order and by the Department of Social Services' suggestion that D.F. be placed in the Center. The district court also noted that there is no evidence that D.F. played any role in the admission. *See* 857 F. Supp. at 1314.

D.F. was first placed in the substance abuse program. She remained in that treatment until late January 1993. The treatment primarily was overseen by social worker R.M. When D.F. was next placed in the Seasons program for treatment of her behavioral problems, the treatment was overseen primarily by B.K. In each program, D.F. was under the care of a treatment team which included a psychiatrist, a social worker, a registered nurse and other therapists. The plan of treatment included a point system to encourage good behavior and program participation. The system was based on levels which utilized privileges and punishment. Patients on the lowest level ("base zero") were confined to their rooms in only hospital gowns and no shoes, and were forbidden to talk to other patients; those on higher levels were allowed to have their own clothes and to interact with others as they saw fit. Patients were encouraged to talk and to write about their problems. They could earn points, and thereby move up levels, for having conversations with their assigned staff member at least once a shift. On the other hand, they lost points for refusing to answer questions or to write in a journal. Medication was also administered to patients by staff decision; D.F. was given Thorazine, Ativan, and Zoloft at one time or other.

Prior to her admission to the ward, D.F. had become a suspect in the deaths of her two young cousins. Staff at the Center were made aware of this suspicion in mid-December, 1992, when a social worker from [redacted] County Human Services notified Center staff. Tr. at 284; Ex. B-2. After that time, the

Center staff often reminded D.F. about the state law reporting requirements and the consequences of D.F.'s statements or admissions. Nevertheless, in line with the hospital policy of encouraging patients to write about and to discuss their problems, D.F.'s treatment was designed to develop trust in staff and to encourage D.F. to reveal her secrets and to speak openly with staff about physical harm she had caused other children. D.F. was questioned directly by staff whether she had ever murdered anyone, and was asked repeatedly to make lists of all the people she had ever harmed.

One week after her arrival at the Center, D.F. was informed that her records as an alcohol abuser were confidential, but that any information about suspected child abuse or neglect was not protected. She signed a form indicating that she understood.[4] Ex. B-1. In addition, D.F. was warned on several occasions that any disclosures about hurting or killing a child would have to be reported to Protective Services.[5] D.F. did not discuss any of her past assaultive behavior for several months. On one occasion, D.F. told a staff member that she couldn't talk with staff because they were required to report what she said. Nevertheless, during her stay at the Center, D.F. did make several admissions regarding past assaultive behavior. In January 1993, D.F. admitted that she had abused three cousins. However, after signing a release to permit disclosure of the statements to social service authorities, D.F. was not prosecuted for these assaults by the [redacted] County tribal authorities. Instead, she was told that Human Services had decided tentatively to "shelve" any charges or consequences for her assaults. Furthermore, she was promised that no harm would come to her as a result of these admissions as long as she continued to make progress and to follow treatment expectations.

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[4] Concerning abuse, the confidentiality form stated: "Federal laws and regulations do not protect any information about suspected child abuse or neglect from being reported under State law to appropriate State or local authorities." Ex. B-1. The government contends that statements not relating to child abuse could be reported, at the social worker's discretion, to social services, the juvenile court, and the school. Tr. at 128-31. The government interprets state law, Wis.Stat.Ann. § 48.981, to require the facility to report suspicions that a child-patient had been abused, but to permit it to report that a child-patient had perpetrated the abuse of other children. D.F. questions the government's reading of Wis.Stat. § 48.981, and notes that the district court rejected that interpretation. The district court appears to have been of the view that D.F.'s statements to the staff could not be reported to law enforcement authorities. In any case, D.F. submits, no staff member suggested that her admissions might be reported to police or the court; "the local child protective services agency and other sponsors of the Seasons program were the only organizations mentioned."

Some of the staff at the Center believed that they were under a legal obligation to report any admissions of child abuse to the authorities. Because they believed that any admission on the part of D.F. would have substantial criminal consequences for her, some of the staff also tried to protect her from the consequences of any confessions by arranging for her to undergo a "5th Step" session with a local minister. They anticipated that D.F.'s conversation with the minister would be privileged and therefore would give her a "safe harbor" where she could make the anticipated disclosures without her having to risk a report to the authorities. However, the session, which was held on March 16, 1993, apparently did not produce the hoped-for result. Tr. at 42-43; 297-98; 337; Ex. A-1. There were also discussions among the staff as to whether the staff could report D.F.'s admissions to authorities.

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[5] The government points out that all the Center staff having contact with D.F. were covered directly or indirectly by the reporting requirements.

Other staff members at the Center believed that D.F. would benefit from taking responsibility for her wrongs and being held responsible for them. Some staff members at the Center were anxious to ensure that D.F.'s statements were reported accurately. One staff member, D.F.'s primary social worker in the Seasons program, B.K., prepared memoranda on her home computer in order to refresh her memory for the purposes of treatment or testimony in court.[6] After D.F.'s confession, staff at the Center cooperated with the F.B.I. D.F. was never informed of this cooperation, and was encouraged to continue to discuss the incident in therapy sessions.

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[6] On April 5, after D.F.'s admission, B.K. used her home computer to write a memorandum recording D.F.'s statements, often using quotation marks. She prepared other such memoranda about D.F., too, to "trigger for myself my impressions as a therapist at the time." R. 30 at 367. B.K. conceded that a secondary motive for the reports was to refresh her recollections for later testimony. Concerning whether her purpose in making the written notes was to assist D.F.'s therapy or to assist law enforcement, B.K. said:

> And I repeat that [that] purpose would be so far removed from my primary [therapeutic] purpose as to be, yeah, in the back of my mind, but certainly not up front as a major concern at the time I wrote these notes.

Tr. at 368.

On April 5, 1993, four months after her admission to the Center, D.F., at that time fourteen years old, admitted to having killed her two young cousins. In a group therapy session run by B.K., D.F. spontaneously told the group that she had killed her cousins. Several hours later she told another staff member of the murders, and of her relief in the disclosure because the secret had been "eating her up." During a treatment team meeting the next day, when B.K. told the other therapists of D.F.'s statement, another staff member immediately reported D.F.'s confession to Child Protective Services, a division of the [redacted] County Department of Social Services, which in turn notified the F.B.I. R. 29 at 53. The resulting F.B.I. investigation led to the charges in this case. D.F. made nine other confessions while a patient at the Center.

On April 22, 1993, an appointed attorney advised D.F. not to speak to anyone about her April 5 admission; she then signed a statement invoking her Fifth Amendment right against self-incrimination. Tr. at 65-66; 74-75; 358; 364-65; Ex. A-5; Def's Ex. 12. D.F. claims B.K. ignored her invocation of her Fifth Amendment rights; the government disagrees, noting that B.K. canceled a planned interview between the F.B.I. and D.F. In fact, stated the government, no law enforcement officer interrogated D.F. or heard her confessions. D.F. also states that "therapists were cooperating with law enforcement not later than Apr. 16." Appellee's Br. at 12. The government argues that there is no evidence that anyone other than B.K. "cooperated" with law enforcement.

B. *Judicial Proceedings*

D.F. was charged with two counts of murder in the second degree, in violation of 18 U.S.C. §§ 1111, 1153, and 5031. Prior to trial, D.F. moved to suppress her confessions on the ground that they were coerced in violation of the Fifth Amendment's privilege against self-incrimination and guarantee of due process. The magistrate judge recommended that the statements be suppressed, not on the basis of the right against self-incrimination, but on the ground that the statements were protected from disclosure by a psychotherapist-patient privilege.

The district court agreed that the statements ought to be suppressed. *United States v. D.F.*, 857 F.Supp. 1311 (E.D.Wis. 1994). It declined to base its ruling either on the psychotherapist-patient privilege or on non-compliance with *Miranda*. Instead, the district court grounded its suppression of D.F.'s statements as involuntary under the Due Process Clause of the Fifth Amendment. Focusing on the holding of the Supreme Court of the United States in *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 521-22, 93 L.Ed.2d 473 (1986), the district court rejected the view that the strictures of the Fifth Amendment's Due Process Clause are applicable only when the impermissible pressure is brought by law enforcement personnel. Rather, it read *Connelly* to permit the suppression of a statement as involuntary when impermissible pressure had been brought by others working on behalf of the state: "I only suggest that that inquiry can go beyond the actions of traditional 'law enforcement' personnel to the actions of the juvenile court system, the legislature, other government officials, and the reasonable feelings of the defendant." 857 F.Supp. at 1325.

The court reviewed the evidence and made factual findings concerning the staff members' views of therapy. The district court noted that some of the Center staff "took a more expansive view of 'therapy' and 'recovery.' Staffers subscribing to this expanded view felt that D.F. would not recover unless and until she took responsibility for her wrongs and was held accountable for them, in a court of law if necessary." *Id.* at 1316. It also found that R.M.'s promise to D.F. "sent two very clear messages: (1) D.F.'s frank disclosure of her past behavior would be generously rewarded, and (2) she would likely be granted leniency on any future disclosures." *Id.* "On April 5, 1993, she broke down and confessed." *Id.* at 1317.

The district court also assessed the Center's relationship with other governmental organizations. The court noted that the staff knew of D.F.'s suspected involvement in the deaths of her cousins and encouraged D.F. to talk about her past crimes. It also found "extensive evidence in the record of the close relationship between staff at the Center and Protective Services, the juvenile court system, and the F.B.I." *Id.* at 1326. It noted that the record established that "many of the staff at the Center saw themselves as an arm of law enforcement." *Id.* "Moreover, the evidence suggests that the warnings [of the consequences of a confession] were minimal, and that, in any event, they never included any mention of D.F.'s Fifth Amendment privilege of self-incrimination." *Id.*

The court then concluded that D.F.'s will was overborne at the time she confessed:

> After considering the totality of the circumstances, I conclude that D.F.'s inculpatory statements were secured through psychological coercion and were not the "product of a rational intellect and free will." *Blackburn [v. State of Alabama]*, 361 U.S. [199] at 208, 80 S.Ct. [274] at 280 [4 L.Ed.2d 242 (1960)]. Given the circumstances under which they were employed, the various "encouragement" techniques employed by the staff were highly coercive. A reasonable person of D.F.'s age, intellect, and mental state would have felt coerced. In sum, D.F.'s confession was not "voluntary" within the meaning of the Due Process Clause of the Fifth Amendment.

Id.

II

DISCUSSION

A. *Threshold Matters*

1. *Jurisdiction*

In this case, the United States appeals a suppression order granted by the district court prior to D.F.'s trial. This court's review of the interlocutory decision is based on 18 U.S.C. § 3731, which states that "[a]n appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence."[7] *See United States v. Rodriguez*, 975 F.2d 404, 408 (7th

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[7] Because an expanding body of federal law developed from suppression rulings made without the benefit of appellate review, in 1968 Congress amended the Criminal Appeals Act (18 U.S.C. § 3731) to permit the government to appeal orders granting motions to suppress evidence made before the trial.

Cir. 1992) (stating that § 3731, permitting government's interlocutory appeal from suppression orders, creates exception to finality requirement for appeal in 28 U.S.C. § 1291). In responding to the appeal, an appellee may rely on any ground in support of the judgment. *United States v. Finn*, 502 F.2d 938, 940 (7th Cir. 1974) (citing *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931) and *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)).[8]

2. *Standards of Review*

Several standards of review are applicable to our consideration of the district court's granting of the suppression motion.

We must assess the district court's understanding of any applicable substantive legal standard on a de novo basis. We owe the district court no deference on pure questions of law. *United States v. Doubet*, 969 F.2d 341, 343 (7th Cir. 1992) ("To the extent that legal determinations factor into a suppression ruling, they are subject to de novo review."). On the other hand, a district court's fact-finding in support of its disposition of a pretrial motion to suppress is reviewed under a clearly erroneous standard. *United States v. Church*, 970 F.2d 401, 403 (7th Cir. 1992), *cert. denied*, — U.S. —, 113 S.Ct. 1009, 122 L.Ed.2d 157 (1993); *see also United States v. Garlock*, 19 F.3d 441,

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[8] *See also United States v. Shameizadeh*, 41 F.3d 266, 267 (6th Cir. 1994); *United States v. Becker*, 929 F.2d 442, 447 (9th Cir.), *cert. denied*, 502 U.S. 862, 112 S.Ct. 183, 116 L.Ed.2d 145 (1991); *United States v. Cahalane*, 560 F.2d 601, 608 (3d Cir. 1977), *cert. denied*, 434 U.S. 1045, 98 S.Ct. 890, 54 L.Ed.2d 796 (1978); *United States v. Swarovski*, 557 F.2d 40 (2d Cir. 1977), *cert. denied*, 434 U.S. 1045, 98 S.Ct. 889, 54 L.Ed.2d 796 (1978).

442 (8th Cir. 1994) (holding district court did not err in factual finding concerning state actors). This circuit recently determined that the voluntariness of a confession is assessed on appeal under the clear error standard of review. *See United States v. Baldwin*, 60 F.3d 363 (7th Cir. 1995). That holding binds this panel as the law of the circuit.

B. *Submissions of the Parties*

1. *The Government*

The government submits that the district court erred in suppressing D.F.'s confessions. It contends that her statements were voluntary because they were not coerced by any government conduct. A statement is voluntary, the government asserts, unless the defendant's will was overborne at the time of confession by coercive *police* activity. *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S.Ct. 515, 520, 93 L.Ed.2d 473 (1986). To determine whether that standard has been met, a court must assess the totality of the circumstances. *See United States v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir.), *cert. denied*, 498 U.S. 875, 111 S.Ct. 203, 112 L.Ed.2d 164 (1990). In this regard, continues the government, the record does not support the claim that Center personnel were agents of law enforcement. The government insists that the district court clearly erred in finding that Center staff (1) worked closely with law enforcement, and (2) reported immediately D.F.'s confession to Protective Services. It points out that B.K. discussed the confession at a team meeting, but that another member of the team reported it to Protective Services. It also contends that D.F. made eight confessions to staffers before there was any contact with the F.B.I. The government insists that the

Center staff questioned D.F. for therapeutic reasons only, not to induce her to incriminate herself. The staff did not view itself as an arm of law enforcement, eliciting a confession. B.K. said:

> [W]e wanted to give her a vehicle for being able to talk about these things so that she could get past this very difficult time in her life and proceed in treatment. But we had to find a way to do that without setting it up so that she would have to tell us and we would have to tell the authorities.

Tr. at 42. According to the government, only B.K. had conversations with the F.B.I., and only after being advised that it was appropriate for her to do so. She confirmed the information about D.F.'s initial confession provided to the F.B.I. by the county Department of Social Services, and discussed the possibility of setting up a meeting between the F.B.I. and D.F. It is the government's view that the district court incorrectly characterized the staff as "surrogate investigators." 857 F. Supp. at 1325.

Turning to the other elements of coercion, the government argues that D.F.'s decision to confess was her own and was spontaneous. She interjected her confession in a group therapy session, taking her social worker completely by surprise. Tr. at 46-47. She told another staffer that night. Several days later, she assured therapist R.M. that she understood there would be consequences to her confession. There was no official coercion; she confessed in response to internal pressure. In fact, Center staff were seeking ways to prevent D.F. from having to face any legal consequences for her acts. There is no evidence that the Center used highly coercive techniques to encourage her to admit to crimes, as the district court claimed. 857 F.Supp. at 1325. D.F. was encouraged to talk about her problems, but was not coerced.

The government also submits that the court erred in finding that D.F.'s placement at the Center was "influenced . . . by a pending court order." 857 F. Supp. at 1314. In the government's view, D.F.'s aunt, desperate to get help for D.F., chose the Center without the help of the juvenile courts. The decision to defer prosecution of D.F. for abuse was [redacted] County's, not a negotiated outcome with Protective Services, as the district court asserted.

The government also criticizes the district court for ignoring the ten subsequent consistent confessions made by D.F. The court found that they were the product of staff pressure on her to expand upon the confession, and did not analyze them individually. This, says the government, was clear error. Subsequent confessions following a coerced confession can be voluntary where circumstances change.[9] *Oregon*

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[9] The government characterizes as voluntary the five confessions to nurses' assistants between April 5 and 17; D.F. initiated two, and responded to general questions like "what's the matter?" by confessing in the other three. According to the government, D.F.'s discussion with R.M., although initiated by him, was a voluntary confession in which she said she understood what she was doing. And, at the family therapy meetings, her confessions were also voluntary. Although not spontaneous, they were made in a noncoercive environment and were brought out for therapeutic purposes. On April 14, 1993, when her sister denied that she was capable of having killed the children, D.F. insisted she committed the murders. The government also contends that the confessions made on April 23 and May 10 were voluntary—even though they were made after D.F. invoked her Fifth Amendment privilege and after B.K. had discussed the previous confession with the

v. Elstad, 470 U.S. 298, 310-11, 105 S.Ct. 1285, 1293-94, 84 L.Ed.2d 222 (1985). In the government's view, D.F. had a clear ability to resist pressure; she finally confessed because of her own conscience, not official coercion. Her will was not overborne. She made a deliberate choice to speak her mind. "The Constitution has not yet been interpreted to protect people against themselves." *Johnson v. Trigg*, 28 F.3d 639, 642 (7th Cir. 1994).

2. *D.F.*

D.F. submits that the district court understood that coercive official action was required before a Fifth Amendment violation could be found, and that such coercion is not the exclusive province of the police department. In this case, D.F. was committed to the custody of county employees in a locked county institution for four months before she confessed. Relying on *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 n. 1, 109 S.Ct. 998, 1002 n. 1, 103 L.Ed.2d 249 (1989), D.F. asserts that county employees are state actors for purposes of the Fourteenth Amendment Due Process Clause, and surely must be so categorized for the Fifth Amendment, too. Here, she points out, the coercion came in the form of repeated questions, a point system of privilege and punishment, and inducements.

D.F. submits that the government's "real argument is that these actions, which the government presumably would concede would meet the *Connelly* threshold if police officers had done them, are not official coercion because of the motives and job titles of those

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F.B.I.—because there was no evidence that B.K. sought to elicit anything from D.F. on behalf of law enforcement.

who in fact acted." Appellee's Br. at 29-30. But, D.F. insists, these Center employees are government agents and thus "state actors" like sheriffs and police officers. D.F. notes that, in *Connelly*, the defendant's confession to an off-duty policeman was "coerced" by the "voice of God," not by police activity. The Court held that only state coercion, not internal coercion, was sufficient to invoke the strictures of the Fifth Amendment. However, D.F. contends, *Connelly* "left room for the atypical case of state coercion, like this one, when it referred time and again more broadly to state action." Appellee's Br. at 31 (citing *Connelly*, 479 U.S. at 164-65, 107 S.Ct. at 520-21).

According to D.F., *Connelly* does not require an examination of the state employees' motives. Rather, it requires a focus on their activity. The proper inquiry is, "were the statements obtained through coercive means, as gauged 'from the perspective of a reasonable person in the defendant's position at the time of the statement.'" Appellee's Br. at 33 (quoting *United States v. Montgomery*, 14 F.3d 1189, 1194 (7th Cir. 1994)). D.F. points to factors indicative of the involuntariness of her confession: the commitment to a locked mental hospital away from familiar people and surroundings; the [redacted] Tribal Court order; the staff's complete control of her life on the ward; the degrading disciplinary techniques; psychoactive drugs; strip searches; the suicide watch on her fourteenth birthday and at other times; the direct questions about her abuse and possible murder of small children.[10] D.F. reiterates the promises made to induce her compliance with therapy and questioning, and the complete lack of *Miranda* warnings. She contends that the district court's decision on voluntariness is thus well grounded in the overall effect of four months of "this barrage of inducements, deception, [and] psychological ploys," that led D.F. to trust the staffers. Appellee's Br. at 36-37.

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[10] D.F. points several times to the demand that she list the persons she had harmed physically, a demand made of her right after "KKK"—a racist message probably aimed at her—

D.F. describes her treatment as a "mixed message." She was given advice on confidentiality and cautioned about admitting child abuse, but was also pushed actively to make those admissions. Her first primary therapist, R.M., admitted the mixed signal (R. 30 at 324, 350, 351-52) and the district court agreed. 857 F.Supp. at 1317. D.F.'s actions reflected her confusion about whether she should speak freely. On March 2, 1993, however, R.M. promised her that, if she continued to make progress and to participate sincerely in therapy sessions, [redacted] County authorities would not prosecute or take other adverse action against D.F. for the injuries she had caused younger children. R. 30 at 327-29; Ex. B-5. The district court found this promise significant; it indicated that she would be rewarded and treated leniently for her frank disclosures. 857 F. Supp. at 1316. One month after the promise, D.F. confessed.

C. *Analysis*

The Fifth Amendment provides that no person shall be deprived of life, liberty, or property, without due process of law. The admission of an involuntary confession violates due process. A confession will be

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had been written on the girls' bathroom mirror, and everyone was being punished. D.F. claims she was particularly vulnerable then, and that the staff's demand was coercive.

found to be voluntary only if the government can demonstrate that, under the totality of the circumstances and by a preponderance of the evidence, it was not secured by the government through psychological or physical intimidation, but rather was the product of a rational intellect and free will. *United States v. Montgomery*, 14 F.3d 1189, 1194 (7th Cir. 1994).

In *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), the Supreme Court reaffirmed a requirement that some variation of police "overreaching" must be present before a defendant's confession can be labeled involuntary and subsequently suppressed. Justice Rehnquist stated in his opinion for the majority that "[we] hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id.* at 167, 107 S.Ct. at 522. The Court surveyed the cases over the past fifty years and summarized:

> Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."

Id. at 164, 107 S.Ct. at 520 (citation omitted). The Court stated that there must be an "essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Id.* at 165, 107 S.Ct. at 521. It underscored the "state actor" requirement by stating:

> The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.

Id. at 166, 107 S.Ct. at 521.

We believe that the district court was correct insofar as it believed that, in assessing the voluntariness of a confession, the holding of *Connelly* does not restrict the protection of the Fifth Amendment's Due Process Clause to the actions of "law enforcement personnel." *Connelly* left undisturbed two of the Court's earlier cases in which the actions of non-police actors had been held subject to the constraints of the Fifth Amendment and therefore implicated the protection of *Miranda.*[11] In *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), the Court held that a court-appointed psychiatrist must give *Miranda* warnings before questioning a prisoner. Although the psychiatrist had been appointed for the "limited, neutral purpose of determining [the defendant's] competency to stand trial," *id.* at 465, 101 S.Ct. at 1874, the government sought to introduce his observations and findings for the "much broader objective" of assessing the defendant's eligibility for the death penalty. *Id.* The Court held that the statement was inadmissible during the sentencing phase of the trial. The Fifth Amendment privilege against self-incrimination, the Court wrote, " 'does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.' " *Id.* at 462, 101 S. Ct. at 1873 (quoting *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)). The Court had no difficulty in assuming that the psychiatrist, although clearly not a government officer, and certainly not a prosecutorial officer, became, by virtue of his court appointment, a state actor.[12]

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[11] These cases were decided in the context of *Miranda.* Therefore, strictly speaking, they deal with the right against self-incrimination, also protected by the Fifth Amendment. However, "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment." *Connelly*, 479 U.S. at 170, 107 S.Ct. at 523. Therefore, they are helpful in delineating the nature of governmental action that triggers the protection of the Due Process Clause in the context of interrogations.

The other case, *Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), held that an IRS agent must give warnings before questioning a prisoner. The Court noted that tax investigations, although not necessarily criminal at the outset, often later become criminal. *Id.* at 4, 88 S.Ct. at 1504-05. The Court did not question whether the agent, although not conducting a criminal investigation, was a state actor whose actions triggered the protection of the Fifth Amendment.

On the other hand, we do not believe that *Connelly* can be read as standing for the proposition that any

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[12] *Accord Battie v. Estelle,* 655 F.2d 692 (5th Cir. 1981) (holding that testimony elicited by a court-appointed psychiatrist was inadmissible during the penalty phase of a capital case unless *Miranda* warnings had been given).

"state actor" can trigger the concerns of the Fifth Amendment. Because the focus must be on the "nature of the statement . . . and the exposure which it invites," *Smith*, 451 U.S. at 462, 101 S.Ct. at 1873, it is well established that the mere government employment of the questioner, standing alone, does not *necessarily* make one a "state actor" for this Fifth Amendment purpose. On this point the circuits have spoken with one voice, even if the application of the principle has, in some cases, been less than clear. In *United States v. Webb*, 755 F.2d 382 (5th Cir. 1985), the defendant, knowing that he was implicated in a murder, fled the CID offices of the military base where he was stationed. He was discovered on a communications tower and threatened suicide. An Army psychiatrist was called, and he engaged Webb in a continuing conversation in order to prevent him from jumping. While talking to the psychiatrist, Webb confessed to the crime. The Fifth Circuit held that the psychiatrist's talk with Webb was not an interrogation. It also held, in the alternative, that the psychiatrist, although employed by the United States Army, was not a law enforcement officer. His talk with Webb had but one purpose—to save Webb's life. 755 F.2d at 391-92. *See also United States v. Moreno*, 36 M.J. 107 (C.M.A.1992)[13] (finding that state social worker, hearing accused's confession, was not acting as "agent" of military investigators).[14] Similarly, in *United States v. Borchardt*, 809 F.2d 1115 (5th Cir.

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[13] The United States Court of Military Appeals, from which this decision emanated, has been redesignated the "United States Court of Appeals for the Armed Forces" pursuant to the National Defense Authorization Act for Fiscal Year 1995, Pub.L. 103-337, § 924, 108 Stat. 2831. Also, the Court of Military Review is now called the "Court of Criminal Appeals." We follow the lead of the Supreme Court, *see Ryder v. United States*,—U.S.—, — n. 1, 115 S.Ct. 2031, 2034 n.1, 132 L.Ed.2d 136 (1995), and adhere to the former names in this opinion.

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[14] *Moreno* followed the same line of reasoning in a counseling setting. In this case a military man accused (and later convicted) of the sexual abuse of his stepson confessed to a state social worker during an interview in her office. He had gone to the interview eight days after the military investigation had been concluded and charges had been brought against him. The social worker had explained to him that she was subject to a court subpoena and could be compelled to testify about the interview, but that her agency would recommend probation if he were to make good progress in a rehabilitation program. Both the military judge and the Court of Military Review concluded that her investigation was sufficiently separate from the military investigation that she was not obliged to advise the appellant of his rights under the Fifth Amendment or under Article 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831, a rights-warning requirement similar to, but broader than, *Miranda*. The Court of Military Appeals affirmed the earlier decisions after finding that the state social worker had not made improper threats or promises, and that the appellant had chosen to go to the social worker's office and to be interviewed by her. 36 M.J. at 112. The court noted particularly that the social worker did not consider herself "a law enforcement officer or on a law enforcement mission," and "was so far from acting as an agent of the military that the information had to be extracted from her by court process." *Id.* at 115. Although holding that the state employee had no obligation to advise the appellant of his rights under *Miranda* or Article 31 prior to the interview, the Court commented:

> [W]e hasten to point out that, had [the social worker] been functioning as a mere conduit for military authorities or had there appeared to be some sort of tacit understanding designed to subvert the purposes of Article 31, we would have had little difficulty in reaching a very different conclusion.

Id. at 117.

1987), the Fifth Circuit held that a nurse employed by a municipal hospital was not a government officer for purposes of the Fifth Amendment when she asked a federal prisoner-patient questions that had as their sole purpose the eliciting of information for the purposes of treatment. 809 F.2d at 1118-19. In both *Webb* and *Borchardt*, the person asking the questions was employed by a government entity. Each asked questions for the sole purpose of assisting the defendant with a medical problem. Accordingly, the questions did not implicate the strictures of the Fifth Amendment.

The Ninth Circuit dealt with a similar situation in *United States v. Eide*, 875 F.2d 1429 (9th Cir. 1989). In that case, a pharmacist employed by the Veteran's Administration was accused of stealing drugs from a hospital. The local police waived a prosecutorial interest in the matter on the understanding that it would be handled as an internal Veteran's Administration matter. The defendant was then questioned by his VA superior and he made, under assurances of confidentially, incriminating admissions that were later used against him in a federal drug prosecution. The Ninth Circuit held that the VA supervisor was not a state actor for purposes of the Fifth Amendment because he was not acting in a criminal investigation or prosecutorial function. *Id.* at 1434.[15]

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[15] Another Ninth Circuit case addresses the issue in a very fact-specific context that sheds little light on the general principles. In *United States v. Roston*, 986 F.2d 1287 (9th Cir.), *cert. denied*,— U.S. —, 114 S.Ct. 206, 126 L.Ed.2d 163 (1993), a person implicated in a ship-board murder was interviewed by the ship's doctor in the captain's cabin. The physician was a reserve police officer in the State of Hawaii. After the interrogation, the defendant was held under guard aboard

A contrary result was reached in *United States v. Diaz*, 427 F.2d 636 (1st Cir. 1970). There a defendant, in custody and in the presence of the police, was interrogated by a draft board secretary about his failure to register under the Selective Service Act. The Court of Appeals for the First Circuit held that the fact that the questions were asked not by a law enforcement officer but by "a person who also performs routine procedural tasks for an administrative agency" does not alter the coercive atmosphere surrounding the questions. *Id.* at 638.[16]

Commonwealth v. A Juvenile, 402 Mass. 275, 521 N.E.2d 1368 (1988), because it bears some factual similarity to the case before us, provides helpful guidance with respect to the application of these principles. In that case, a juvenile living at a state-

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the vessel which was under way at the time. The Ninth Circuit held that the interrogation was conducted by a person acting in a private capacity. His reserve appointment as a law enforcement officer was a "mere fortuity." Notably, the court did not discuss the possibility that, because the ship's doctor was acting under the authority of the captain of the vessel, he might have been undertaking a law enforcement function.

[16] In this discussion, we have focused on cases involving, as does ours, the right against self-incrimination protected by the Fifth Amendment. Cases involving the Sixth Amendment right to counsel also provide a somewhat helpful analogy. In *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980) and in *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), the Court examined whether the government had used a government agent and had focused deliberately on the defendant. The key in these cases has been whether the government directed the interrogator toward the defendant in order to obtain incriminating information. *See also United States v. York*, 933 F.2d 1343, 1355-56 (7th Cir.), *cert. denied*, 502 U.S. 916, 112 S.Ct. 321, 116 L.Ed.2d 262 (1991).

supported home for troubled adolescents, to which he had been committed by the Commonwealth's department of youth services, was interviewed by the assistant director of the facility about an assault that had taken place in the vicinity. At the time of the interrogation, suspicion had focused on the juvenile. The assistant director had consulted with the police and he was "convinced the juvenile had committed a crime and questioned him several times before the juvenile confessed." *Id.* 521 N.E.2d at 1370. The Supreme Judicial Court of Massachusetts held that the trial court was on solid ground in its factual determination "in all the relevant circumstances," *id.* at 1370, that the assistant director was acting "as an instrument of the police." *Id.*

These cases make clear that it is not the particular job title that determines whether the government employee's[17] questioning implicates the Fifth Amendment, but whether the prosecution of the defendant being questioned is among the purposes, definite or contingent,[18] for which the information is elicited. *See, e.g., Mathis*, 391 U.S. at 4, 88 S.Ct. at 1504-05 (determining that tax investigations, which "frequently lead to criminal prosecutions," require *Miranda* warnings when that possibility exists). The "particular office that the official who performs the custodial interrogation represents is inconsequential." *Battie v. Estelle*, 655 F.2d 692, 699 (5th Cir. 1981). Therefore, although a government employee need not be a law enforcement official for his questioning to implicate the strictures of the Fifth Amendment, his questioning must be of a nature that

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[17] A similar analysis has been employed when the questioner is not a government employee but may have undertaken the questioning to fulfill a governmental obligation because of a special relationship imposed by law or contract. The Eighth Circuit recently "recognize[d] that the government can exercise such control over a private actor that a 'private' action can fairly be attributed to the government for purposes of the Fourth and Fifth Amendment[s]." *United States v. Garlock*, 19 F.3d 441, 443 (8th Cir. 1994) (citing *Fidelity Fin. Corp. v. FHLB*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 949, 93 L.Ed.2d 998 (1987)). In that case, a bank teller confessed to a bank security officer that she had embezzled bank money. The court reviewed the actions of the security officer, who was hired expressly to investigate the disappearance of money from the bank's vault, and the corporate auditor, who helped in the investigation and questioned the defendant before she confessed. The court affirmed the district court's determination that the two investigators were pri-

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vate actors outside the ambit of the Fourth and Fifth Amendments because there was no governmental nexus: (1) the bank, although heavily regulated by the government, is not an instrumentality of the government; (2) there was no evidence that law enforcement knew of the investigation prior to the defendant's confession; (3) the investigators were not private persons used to target a particular suspect; (4) the banking regulations requiring security officers to report internal bank crimes to the Officer of the Comptroller of Currency, not to law enforcement authorities; and (5) the investigators were not subject to the Fourth and Fifth amendments "simply because they were engaged in the 'public function' of law enforcement." 19 F.3d at 443. Because the bank investigators were pursuing the bank's valid interest in internal security, rather than the government's interest in a criminal conviction, the court held they were private actors.

[18] We include the term "contingent" simply to take into account that the questioner, although clearly acting for a law enforcement purpose, may not have sufficient authority, as *Mathis* demonstrates, to control whether the ultimate disposition will be criminal, quasi-criminal or civil or, as in *Estelle v. Smith*, to control the precise use to which the statement will be put in the course of such a proceeding.

reasonably contemplates the possibility of criminal prosecution.

In assessing whether a particular individual is acting in a capacity that contemplates prosecution as one of the fruits of his work, it is important to note, as the cases have recognized, that an individual can often play more than one role and that the subject does not always—and cannot always—appreciate the subtleties of such a dual role. As we noted in *Williams v. Chrans*, 945 F.2d 926, 952 n. 44 (7th Cir. 1991), *cert. denied*, 505 U.S. 1208, 112 S.Ct. 3002, 120 L.Ed.2d 877 (1992), one of the concerns in *Estelle* was the unexpected role-shifting that occurred when a neutral psychiatric interview was used as a tool for the prosecution. The Second Circuit also has stated that the concerns that animate *Estelle* are triggered whenever a defendant does not know that the prosecution might subsequently use the information against him in a manner unrelated to the purported purpose of the interrogation. *See United States v. Cortes*, 922 F.2d 123, 127 (2d Cir. 1990); *see also United States v. A.R.*, 38 F.3d 699, 703 (3d Cir. 1994) (indicating that Fifth Amendment concerns arise when a purportedly neutral examination is later used to prove an element of the government's burden in a criminal prosecution); *Gholson v. Estelle*, 675 F.2d 734, 738 (5th Cir. 1982) (noting that such role shifting strikes at the heart of the adversary system and adds an element of unreliability to any evidence so presented).

The application of these principles to the context of psychiatric patients presents especially difficult analytical problems. A great deal of the available care in this area is administered by various governmental agencies, and those suspected of criminal activity are especially likely to be found in a facility operated under the auspices of a governmental agency. Consequently, the caregivers are employed by the government. Caregivers in the mental health field are often organized as a team in which everyone from the directing psychiatrist to the ward aide is an important part of the effort, and a free exchange of information among the staff is an imperative. Psychiatric care often involves, as it did in this case, an effort to have the patient discuss freely with the caregiver his apprehensions and fears. According to the record in this case, it is also salutary, at least in some situations, for the patient to take responsibility for his actions and to experience the consequences that flow from taking such responsibility.

However, if it can be reasonably concluded that the caregiver goes beyond these accepted medical roles and affirmatively takes on the role of delivering someone who is in his care and custody to the prosecutor, the district court is entitled to determine that the caregiver has changed his role substantially. As the district court recognized, the most obvious example of this dual prosecutorial/healer role is when there is a specific arrangement between law enforcement and medical personnel to collaborate in the prosecution of an individual. *See D.F.*, 857 F.Supp. at 1326 n. 34. If those efforts are the cause of the confession, the Fifth Amendment's Due Process Clause is certainly implicated. Even if there is no explicit agency arrangement, the medical staff of a state facility can nevertheless decide that its cooperation in the prosecution of patients is part of its responsibility, and can include such a goal among its activities. In such a circumstance, the absence of a formal agreement with prosecutorial authorities cannot be deemed outcome determinative.

The district court's initial reading of *Connelly* may well have been broader than it should have been. The district court was correct in holding that state employees other than law enforcement officers can trigger, by their actions, the protection of the Due Process Clause of the Fifth Amendment. However, it might at first glance seem less than clear that the district court believed that such extra-police interrogation by other state employees or agents needed to be conducted at least in part for a law enforcement purpose in order to implicate those protections. As we have noted, *Connelly* cannot be read that broadly if it is to live in peace with the rest of our Due Process jurisprudence. It is clear that the state actor's questioning of the defendant must have as one of its purposes, definitive or contingent,[19] the use of the statement in a criminal prosecution. Even if we assume that the district court might have misapprehended the scope of *Connelly*, we must conclude that such an over-reading of the precedent did not affect its analysis in this case. Here it is clear that the district court focused on whether the staff of the Center had assumed, as part of their function, the prosecution of D.F. Dealing with conflicting evidence and, necessarily, with the credibility of witnesses, the district court concluded that the record established

> coercion—indeed, a bit of overreaching—by government officials. Staff members at the Center were either enlisted or volunteered to act as law enforcement surrogates in eliciting confessions

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[19] *See* footnote 18, *supra.*

> from troubled teens. There is extensive evidence in the record of the close relationship between staff at the center and Protective Services, the juvenile court system, and the F.B.I. There is also evidence that many of the staff at the Center saw themselves as an arm of law enforcement.

857 F.Supp. at 1325-26.

We believe that, whatever our own judgment might have been had we sat as trial judges in this case, a respect for the division of roles assigned to the trial and the appellate benches requires that we not disturb the district court's conclusion that the medical staff of the Center saw the prosecution of D.F. as a part of their work. Although the evidence is not at all one-sided, we cannot say that the court was clearly erroneous.[20]

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[20] We do not suggest that the case law requires the suppression of every statement made to a health care worker who has a duty to disclose admissions about certain criminal activity to authorities in order to prevent future harm to third parties. As a threshold matter, we note that the applicability of the Fifth Amendment's government actor requirement to all those who have a duty to report certain criminal activity that comes to their attention is simply not implicated in this case. Here the district court found that the personnel of the Center took as one of their purposes the extraction of criminal admissions for the purpose of prosecution. We simply hold that, in this highly fact-specific case, the district court was quite correct when it determined that the state, with an eye to prosecution, cannot coerce admissions under the guise of treatment and then prosecute on the basis of those admissions. More fundamentally, there is a quantum difference between the purposeful and coercive extraction of admissions for the purpose of prosecution and the simple reporting of information, whether because of a reporting requirement or a subpoena, which comes to the attention of the health care provider in the course of a

Nor can we find that the district court erred clearly when weighing whether the confessions of D.F. were indeed involuntary. The court reviewed the efforts of the staff to gain her trust, the systems of rewards and sanctions that were imposed, the absence of any comprehensive warning as to the full consequences of her disclosure, and the absence of any mention of her right against self-incrimination. On the basis of its analysis of the evidence, the district court came to the conclusion that D.F.'s inculpatory statements were not "the 'product of a rational intellect and free will.'" 857 F.Supp. at 1326 (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S.Ct. 274, 280-81, 4 L.Ed.2d 242 (1960)). We cannot say, given the standard of review to which we must adhere, that that conclusion is clear error. *Baldwin*, 60 F.3d at 365 (7th Cir. 1995). Nor can we say that the district court was in error in its conclusion that the subsequent confessions of D.F. were inadmissible because they were the result of continued staff pressure. Although subsequent confessions are not necessarily tainted by an earlier confession, *see Oregon v. Elstad*, 470 U.S. 298, 310-11, 105 S.Ct. 1285, 1293-94, 84 L.Ed.2d 222 (1985), here the district court explicitly determined that the subsequent statements were the product of impermissible staff pressure.

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legitimate, non-law enforcement encounter with a patient. This is the distinction that our colleagues in the other circuits have made in the cases we have discussed; we see no reason to depart from this settled principle.

CONCLUSION

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 93-CR-202 (JPS)

UNITED STATES OF AMERICA, PLAINTIFF

v.

D.F., DEFENDANT

[FILED: JULY 19, 1994]

DECISION AND ORDER (REDACTED)

STADTMUELLER, District Judge.

This tragic case began on January 5, 1992, when an infant girl was found dead in her parents' home [redacted]. Six days later, her sister was also found dead. Their deaths were initially attributed to Sudden Infant Death Syndrome and influenza. Based on a series of statements made to mental health counselors and reported to law enforcement officials, however, the Government subsequently charged the infants' cousin, D.F., with murder. Today, the court decides whether the Government may use D.F.'s statements to support its case against her.[1]

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[1] D.F.'s motion for a jury trial is also pending before the court. The Government's papers suggest, however, that, given the court's ruling on the defendant's motion to suppress, that

PROCEDURAL HISTORY

On November 17, 1993, the Government filed an information charging D.F., a juvenile, with two counts of murder in the second degree, in violation of 18 U.S.C. § 1111, 1153, and 5031. D.F. made an initial appearance in U.S. Magistrate Judge Aaron E. Goodstein's court on November 18, 1993. On March 7, 1994, D.F. moved to suppress a series of inculpatory statements she made to [redacted] County Mental Health Center ("Center") therapists and staff members. In that motion, D.F. argued that the statements were procured in violation of the Fifth Amendment's privilege against self-incrimination and the Fifth Amendment's guarantee of due process. D.F. reserved an argument that the statements were protected by the psychotherapist-patient privilege for trial.

In recommending that the statements be suppressed, Magistrate Goodstein found that although the protections against self-incrimination announced in *Miranda v. Arizona* did not apply to limit D.F.'s discussions with the Center staff, her statements made during the course of therapy were absolutely protected from disclosure by the psychotherapist-patient privilege. Both parties objected to the Magistrate's Recommendation: the Government objected to the overall recommendation, and to the Magistrate's findings on the psychotherapist-patient privilege; D.F. objected to the Magistrate's findings on the *Miranda* issue, and renewed her argument that the statements were not voluntarily made.

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motion has become moot. As a result, the court will defer a ruling on the defendant's motion for a jury trial until and unless it becomes necessary.

FACTS[2]

At all times relevant to the suppression motion, D.F. was thirteen or fourteen years old. She presents a history of runaway behavior, assaultive behavior, and drug and alcohol abuse. (Transcript of Proceedings Exhibit ("Ex.") J-1.) There is evidence that she suffered from extensive abuse, including physical and sexual abuse, during her childhood. (Ex. J-1 at 2.) She has had extensive exposure to the juvenile social services and justice system. (Ex. J-1 at 1.) Prior to being charged in this case, she had been charged with battery on at least three occasions, and was suspected in at least three other incidents. (Ex. 1 at 8, J-1 at 1-2.) She has lived with five different legal guardians, and has considered a sixth. (Ex. 1 at 9, J-1 at 1.)

From December 4, 1992 to May 14, 1993, D.F. participated in a residential treatment program at the Center. For our purposes, D.F.'s placement at the Center was less than voluntary.[3] There is no evidence in the record that D.F. played any role in the admission decision.[4] Moreover, the evidence suggests that Ms. A., D.F.'s aunt and the person who technically made the admission decision, was heavily influenced in making that decision both by a pending court order and by the Department of Social Services' suggestion that D.F. be placed at the Center. (Transcript of Proceedings ("T.") at 247-48; Third Supplemental Statement of Uncontested Facts ("Third Facts") at 6.) In light of D.F.'s alcohol and drug problems, the Department had the power to remove her from Ms. A.'s home or to move in court for an involuntary placement. (Magistrate's Recommendation ("R.") at 2; T. at 247-49; Third Facts at 6-7.)

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[2] The court did not hold an evidentiary hearing on this motion. As a result, the factual findings come from the parties' agreed statements of facts, the magistrate's findings, and the transcript of the magistrate's hearing on this issue. To the extent that the magistrate's findings are dependent upon credibility determinations, this court may not reject them unless they are clearly erroneous. *United States v. Ornelas-Ledesma*, 16 F.3d 714, 720 (7th Cir. 1994). In all other respects, the court's review is *de novo*.

[3] From a nonconstitutional legal standpoint, however, she participated in the program as a voluntary admission (as opposed to a court-ordered involuntary admission).

Each patient[5] at the Center interacted with and was treated by a number of different staff members. As a general matter, however, a team of professionals (including a psychiatrist, a social worker, a registered nurse, an occupational therapist, and a recreational therapist) was responsible for the progress and treatment of each patient. (T. at 128; Third Facts at 2.)

Children and adolescents at the Center were considered to be the patients of Dr. J.G., staff psychiatrist and Director of the Child and Adolescent Unit at the Center. (Third Facts at 3.) In his clinical role, Dr. G. performed a number of functions: he attended weekly team meetings, he supervised the social workers and registered nurses on the team, and he made high level clinical decisions, including decisions about medications and level of supervision. (Third Facts at 4.) He also had direct contact with each patient at least once a week. (Third Facts at 4.)

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[4] In D.F.'s Initial Psychiatric Evaluation, Dr. E.J., the Associate Clinical Director of the Center, notes her attitude toward her admission:

> The patient's thought content seems to be somewhat preoccupied with her ambivalence about being in the hospital. She is particularly uncomfortable with her admission status and the lack of freedom involved with that.

(Ex. J-1.)

[5] Residents at the Center are alternatively referred to as "patients" and "clients." For ease of reference, I will refer to them as "patients."

Day-to-day treatment responsibilities, however, were left to the remaining members of the team. Social workers, with occasional supervision from Dr. G., made the necessary treatment decisions. (Third Facts at 2, 4-5.) Initially, R.M. served as the social worker for D.F; B.K. assumed those duties at a later time. Registered nurses met directly with Dr. G. to review patients' charts on weekdays. (Third Facts at 2, 4.)

As a general rule, statements made by patients at the Center were considered "confidential," and were not to be reported to anyone other than the other members of the treatment team. (T. at 119, 194-95.) There were a host of exceptions to this rule of "confidentiality," however. Patient statements were shared with a liaison official from the [redacted] County Department of Social Services, who was part of the treatment team. In addition, general statements (statements not relating to child abuse) could also be passed on, at the social worker's discretion, to personnel from the [redacted] County Department of Social Services (including the Children's Protective Services Unit, or "Protective Services"), the [redacted] County Juvenile Court, and the [redacted] Public Schools. (T. at 128-31.)

Other exceptions were created by statute. The Wisconsin Children's Code created mandatory reporting requirements for accounts of child abuse *by victims.* Wis.Stat.Ann. § 48.981. Under the reporting provisions, members of the treatment teams (physicians, nurses, social workers, occupational therapists) were required to report any suspicions that a patient had been abused. *Id.* The provisions also provided that "other persons" suspecting abuse of *any child* (i.e., including abuse by a patient of another child) *may* report those suspicions. *Id.* The provisions do not appear to address the situation at issue in this case, i.e., a team member suspecting that a patient had abused another child. To the extent that they do address that situation, they appear to preclude disclosure of such suspicions: "[t]he purpose of this subsection is to allow children to obtain confidential health care services." *Id.*

Mr. M. and Ms. K. and, apparently, several other staff members misunderstood the reporting provisions during most of D.F.'s stay at the Center. Upon admission to the Center, D.F. was shown and signed a form that outlined the limits on confidentiality at the Center. (Ex. B-1; T. at 280.) Mr. M. presented the form to her, and suggested to her that any statements she made about abuse of other children would have to be reported. (T. at 280.)

Patients at the Center were told that their statements were confidential, at least with respect to the unit. (T. at 209.) There is evidence that D.F. thought that statements made during therapy and to staff were confidential. (Ex. F-1 at 1.) However, there is also evidence that she knew her statements would be reported. In January 1993, D.F. refused to answer an explicit query about whether she had ever murdered anyone. (Ex. B-3; T. at 288.) She also refused to talk during another encounter, stating that she couldn't because of staff's reporting requirements. (Ex. C-5; T. at 403.) Ms. A. also informed Mr. M. of a statement by D.F.: "if all is known about what she's done, she'd go to jail for a long time." (Ex. B-4.) To the extent that D.F. knew about mandatory reporting, however, it is not at all clear that she knew the destination and consequences of any reporting.

While at the Center, D.F. did enjoy some level of freedom. Although she lived in Unit One, a locked unit, she was able to move around within the unit and to other buildings for school and meals. (R. at 3; T. at 25-28.) Supervision while on campus varied depending on behavioral and safety concerns. (R. at 3; T. at 26.) Patients could negotiate temporary *supervised* trips off campus after they had earned sufficient behavior "points" (see discussion, *infra*). (T. at 28-31.) Patients under fourteen could only leave the Center permanently with family help. (T. at 28.) Those who were fourteen years old or older could leave the Center without family help, but only after waiting a period of forty-eight hours. (R. at 3; T. at 250-51.) During that forty-eight hour period, the medical director could go to court to prevent the patient from leaving. (R. at 3; T. at 251.) D.F. invoked her right to leave the Center on April 8, 1993; she later rescinded. (Ex. B-8; T. at 308-311.)

Staff at the Center "encouraged" the patients to discuss their problems openly and honestly. This "encouragement" took many forms. As a general matter, patient privileges and relative freedoms were determined through the use of a point system. (T. at 261.) Points could be earned for, among other things, open and sincere participation in group therapy sessions, as well as open and honest discussion in one's journal; failure to do these things could result in a loss of points. (T. at 165, 262.) Patients also had to have regular conversations with their "person in charge" (usually nursing staff) about "why they are there."[6] (T. at 157-58, 203, 223.) Over and above the point system, patients were constantly encouraged to open up and be honest with staff and with family about their problems; frank exchanges were considered critical both to general treatment goals and to establishing a level of trust between staff and the patients. (*E.g.*, T. at 318-19.)

Because of her behavioral problems and her problems with mistrust of authority, D.F., in particular, had a care plan specially designed to encourage her to address anger issues by speaking frankly about the abuse she had inflicted on other children. (Ex. 5-8; T. at 266, 419.) For example, on December 31, 1992, she was encouraged to discuss her abuse of smaller children in her care; at the end of the session, she was "encouraged to work on these issues and to write more in her journal relating to these issues." (Ex. 6 at 2; T. at 267-68.) On January 1, 1993, she was given an assignment "to make a list of people she has hurt." (Ex. C-3, 7; T. at 225-26, 267-70, 415.) On January 18, 1993, she was asked whether she had ever murdered anyone. (Ex. B-3; T. at 117, 287-88.) T.K., a member of D.F.'s treatment team, stated in an interim note on D.F.'s progress that exploration of D.F.'s physical abuse of young children was "of utmost importance." (Ex. 10 at 1; T. at 354-56.)

Occasionally, through negotiations with the juvenile justice system, staff at the Center were able to exert extra leverage on their patients. On March 2, Mr. M. informed D.F. that she would not be prosecuted for her admitted assaults provided that she continued to make treatment progress, and follow treatment expectations. (Ex. B-5; T. at 327.) "Making treatment progress" included avoiding going AWOL, and "continuing to participate sincerely" in treatment. (T. at 329.) By negotiating this arrangement with Protective Services, and by communicating it to D.F., Mr. M. sent two very clear messages: (1) D.F.'s frank disclosure of her past behavior would be generously rewarded, and (2) she would likely be granted leniency on any future disclosures.

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[6] In addition, when patients were on suicide watch (as D.F. often was), they were further encouraged to open up and discuss their problems. (T. at 403-404, 407.)

Once a particular problem in D.F.'s past became apparent, she was pushed even harder to discuss it. For example, after April 5, when D.F. made her initial disclosures, further discussion about her role in her cousins' deaths was encouraged; in fact, it became part of her care plan. (Ex. F-1 at 1.) For example, on two occasions, staff told her (1) to "tell the truth ... tell them how you did it"; and (2) "these are the reasons you're here, you need to talk about them and get them resolved." (Ex. F-1, I-1; T. at 183-85, 206-07.)

While D.F. was at the Center, Mr. M. cooperated with staff at Protective Services in [redacted] County and [redacted] County. He provided information to Protective Services about statements D.F. made while at the Center. (T. at 290-93.) He arranged for D.F.'s records, which included admissions regarding crimes, to be released to Protective Services. (T. at 292-93.) He also arranged for Protective Services to question D.F.: [redacted] County staff questioned her twice in January, (T. at 290-91); a worker from [redacted] County spoke with D.F. on February 11. (T. at 290, 325-26.)

For many staffers, this broad policy of "encouragement" appears to have been motivated solely by treatment concerns. Encouraging D.F. to talk about her past actions was part of her care plan, and was universally seen as therapeutic and essential to any recovery. Some staff, however, took a more expansive view of "therapy" and "recovery." Staffers subscribing to this expanded view felt that D.F. would not recover unless and until she took responsibility for her wrongs and was held accountable for them, in a court of law if necessary. (T. at 162, 178, 192, 342-43.)

Mr. M. was informed in December 1992 that D.F. was suspected in the deaths of her two cousins and in the assaults of other cousins.[7] (R. at 4; Ex. B-2 at 2; T. at 283.) Ms. K. learned about these suspicions sometime before February 23, 1993. (Ex. A-1.) At that time, both counselors felt that the Wisconsin child abuse reporting requirements required them to report any incriminating admissions made by D.F. to law enforcement authorities. (R. at 4; T. at 41.) Consequently, Mr. M. warned D.F. that she should be cautious about what she said, and that her counselors would have to report any disclosures she made about harming other children. (R. at 4.) He estimates that he warned her in this way on approximately ten occasions and recorded notes about his warnings in her chart about four times. (R. at 4.) Exhibits before the court reflect two such warnings. (Ex. B-4, A-1.)[8]

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[7] Obviously, the fact that Ms. N.M., the [redacted] County employee who advised Ms. A. to admit D.F. to the Center, was also feeding Mr. M. information about D.F.'s crimes doesn't help the Government's argument that there was no law enforcement involvement here.

These warnings apparently had a mixed effect on D.F. On one hand, several factors were working to limit the effect of the warnings. At the same time that Mr. M. was warning her about her disclosures, the staff plan was to get her to open up, to disclose as much as possible. (T. at 322-24.) Moreover, in his "warnings" to D.F., Mr. M. never warned D.F. that her statements might be used in court, or that she could have a lawyer present. (T. at 321; *cf.* T. at 209.) Additionally, the warnings were based on an admittedly mistaken reading of the Wisconsin child abuse reporting requirements. (T. at 321.) On the other hand, the warnings did seem to have some effect. As the discussion above, *supra* pp. 1314-1315, demonstrates, D.F. resisted the considerable pressure to confess for several months.

On April 5, 1993, she broke down and confessed. At a group meeting with Ms. K., eight to ten other adolescents, and an "adult co-facilitator," D.F. admitted to killing her two cousins. (R. at 5; T. at 45-49.)[9] Ms. K. memorialized D.F.'s confession that same night, and informed Ms. A. about it. (T. at 51, 60.) She did not, however, consult with or inform Ms. A. or D.F. about her decision to report it. (T. at 125-26.)

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[8] Mr. M. started to question his initial reading of the reporting requirements sometime in the end of March. (T. at 299-300.) At a weekly meeting, team members discussed whether not reporting D.F. admissions might be an option. (T. at 301.)

[9] In addition to the admissions mentioned below, D.F. also repeated her admissions to staff on a number of occasions, including April 14. (T. at 160-63.) She was not warned about the consequences of disclosure before any of her subsequent disclosures. (T. at 317.)

The next day, at the weekly team meeting, Ms. K. informed the members of the team of D.F.'s confession. (R. at 6.) D.V., a liaison from the Department of Social Services, immediately went to the telephone and reported D.F.'s disclosures to Protective Services.[10] (R. at 53.) As a result of this report, the F.B.I. initiated the investigation that led to D.F.'s arrest. (R. at 6.)

Later that day, Ms. K., Mr. M., and Dr. G. had further discussions regarding whether D.F.'s statements should have been disclosed. (R. at 7; Ex. A-3; T. at 53-55.) Mr. M. expressed concerns regarding whether the disclosures should have been made; Dr. G., a psychiatrist at the Center for 25 years, was not sure whether the disclosure should or could have been made, and suggested that Mr. M. and Ms. K. seek further professional advice about what to do next. (T. at 54.)

On April 16, in responding to a call from the F.B.I. about D.F.'s admissions, Ms. K. expressed her uncertainty regarding the propriety of the disclosure. (T. at 62.) Later that day, she was informed for the first time by administrators and counsel at the Center that she had been permitted, but not required, by the Wisconsin Child Abuse reporting provisions to report D.F.'s statements. (R. at 7; T. at 64, 145-50.) *See* Wis.Stat.Ann. § 48.981.[11] She was also informed that because she had warned D.F. of her reporting requirements and reported in good faith, her permissive reporting was appropriate. (Ex. A-6; T. at 147.) They further advised her to cooperate with the F.B.I., and she decided to do so. (T. at 151.)

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[10] In light of the Department of Social Services presence on the treatment team, and the Center's close working relationship with Protective Services and the juvenile court system, it is difficult to tell exactly when D.F.'s statements technically were "reported" for the purposes of the Wisconsin Reporting Statutes or who reported them. Such determinations are not necessary, however, for resolution of this motion. The important fact is that D.F.'s statements were reported, directly or indirectly, to law enforcement.

The court notes, however, that in her testimony, Ms. K. essentially assumes that she was the one who reported the statements. She also admits that, when the information was reported, she knew that it would likely lead to charges being filed against D.F. (T. at 144-45.)

Sometime in April,[12] Ms. K., D.F., and several nursing assistants met with Mr. F., an attorney from [redacted] who had been appointed to provide D.F. with precharge representation. (T. at 66-67; F. Aff. at 2-3.) At that meeting, Mr. F. told D.F. not to speak to any law enforcement agents or County Social Services personnel. (R. at 7; T. at 66-67.) He warned her that family and friends with information could be forced to disclose it. (Ex. A-5; T. at 66-67.) At that time, D.F. signed an invocation of her Fifth Amendment rights in Ms. K.'s presence.[13] (R. at 7; Ex. 12.)

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[11] In fact, advice from counsel may have been wrong. From the court's reading, § 48.981 does not permit or require Ms. K. to disclose D.F.'s statements. In fact, it doesn't address D.F.'s situation at all. Moreover, the court notes that if these disclosures had been made several months earlier, during D.F.'s time in the Center's drug and alcohol program (or if they had been made by Mr. M.), they might have violated federal law. *See* Ex. B-1; 42 U.S.C. § 290ee-3.

[12] Ms. K. states that the meeting took place on April 22; however, Mr. F.'s affidavit regarding the meeting is dated April 21. It appears, however, that the meeting did occur after Ms. K.'s meeting with administrators and counsel for the Center on April 16.

Ms. K. did not inform Mr. F. at this meeting of her current and future plans to cooperate with the F.B.I. (T. at 359; F. Aff. at 2.) It does not appear that D.F. had been informed of Ms. K.'s cooperation. (T. at 356-58, 338-39.) If Mr. F. had known of such cooperation, he would have taken steps to ensure that D.F. did not talk to any Center staff and, ultimately, to ensure that D.F. was removed from the Center. (F. Aff. at 2-3.) Ms. K. told Mr. F. that therapy sessions were "confidential," and did not tell him of the Center's aforementioned position regarding the permissive reporting of statements made in these supposedly "confidential" therapy sessions. (T. at 360.)

D.F. repeated her confession at family therapy meetings on April 14, April 23 and May 10.[14] (R. at 7; Ex. A-6, A-7, A-8, B-7 at 2; T. at 70-83.) Incredibly, despite Ms. K.'s discussions with the F.B.I. and corporation counsel, and Mr. V.'s discussions with Protective Services, Ms. K. reassured the family and D.F. of the confidentiality of the family therapy sessions at the April 23 session. (R. at 7; Ex. A-6; T. at 55-56.) During the April 23 and May 10 sessions, she asked "facilitating" questions that were designed to encourage a free discussion of D.F.'s actions. (T. at 362-63, 367-68.) Partially out of a concern that she might be asked by law enforcement exactly what D.F. had said, Ms. K. included in her notes of the May 10 meeting direct quotes from D.F. (T. at 368-69.)

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[13] The invocation reads as follows:

> I, . . . [D.F.], hereby declare that I do not want to be questioned by the police, sheriff's department, district attorney, or any other law enforcement official concerning the pending charge or any other matter without my attorney being present. Therefore, I am invoking my right to remain silent and right to counsel protected under the Fifth Amendment of the United States Constitution.

Ex. 12.

[14] Ms. K. also recalls an April 9 meeting in which D.F. recounted her role in her cousins' deaths. Presumably because there were no notes taken of that meeting, however, the Magistrate did not credit Ms. K.'s testimony in his findings of fact. A review of the transcript suggests that that was the correct decision.

After her initial disclosures on April 5, D.F. was constantly "encouraged" to repeat and expand upon those disclosures. (T. at 231-32.) In response to this "encouragement," she made incriminating statements on a number of other occasions. (Ex. E-3, E-4; T. at 231-32, 382-86.) The Government seeks to use all of these statements in its murder case against D.F.

DISCUSSION

Magistrate Goodstein recommended that the statements made by D.F. during the course of her psychotherapy be suppressed. This court's review of that recommendation is *de novo.* 28 U.S.C. § 636(b)(1)(C).[15] The Magistrate based his recommendation on the psychotherapist-patient privilege, the starting point of my analysis.

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[15] As an initial matter, the Government objected to the Magistrate's findings on the psychotherapist-patient privilege issue because (1) that issue had not been raised by the parties and (2) matters of nonconstitutional privilege are not properly handled in the context of a motion to suppress. As a technical matter, these procedural arguments may have some merit. At this point, however, any procedural error is harmless, as the factual record and legal briefing now before the court is sufficient to decide the privilege issue. Certainly, neither the interests of justice nor the interests of judicial economy would be served if the court chose to deny the motion to suppress on

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The application of nonconstitutional privileges in the federal courts is governed by the Rules of Evidence:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed.R.Evid. 501. Without the benefit of briefing from the parties, the Magistrate, in applying Rule 501 to the facts of this case, found that state law of nonconstitutional privilege should govern. (R. at 11.) The parties argue, and the court agrees, that this finding was in error,[16] and that the court must look instead to

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procedural grounds and then later adopt the Magistrate's reasoning in response to a motion to exclude the statements on evidentiary grounds.

[16] "In nondiversity jurisdiction civil cases, federal privilege law will generally apply. . . . As Justice Jackson has said:

federal law to determine the existence and scope of any psychotherapist-patient privilege.[17]

Congress has mandated that "principles of common law . . . in light of reason and experience" govern the application of nonconstitutional privileges. *See* Fed.R.Evid. 501. The court recognizes that the psychotherapist-patient privilege did not exist at common law.[18] Note, *Developments in the Law—*

> A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state.

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 471, 62 S.Ct. 676, 686, 86 L.Ed. 956 (1942) (Jackson, J., concurring)." Conference Report No. 93-1597, 93d Congress, 2d Session 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7101.

Note also that the court is not convinced that D.F.'s statements would be protected under the Wisconsin psychotherapist-patient privilege. *See* Wis.Stat.Ann. § 905.04. Under Wisconsin law, "[t]here is no privilege in trials for homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide." Wis.Stat.Ann. § 905.04(4)(d). What little case law there is on the homicide trial exception suggests that it would apply to the facts of this case. *See, e.g., State v. Jenkins*, 80 Wis.2d 426, 259 N.W.2d 109, 113 (1977).

[17] Federal juvenile proceedings such as this one are technically classified as "civil" in nature. Nevertheless, because substantive federal law will govern in this action, Rule 501 clearly provides that federal common law govern with respect to nonconstitutional privileges.

[18] Where the privilege exists, it was created by statute. *See In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989), *cert. denied*, 493 U.S. 906, 110 S.Ct. 265, 107 L.Ed.2d 214 (1989).

Privileged Communications, 98 Harv.L.Rev. 1450, 1539 (1985). Several circuit courts have held that that recognition precludes further analysis under Rule 501. *See In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir.) ("[b]ecause our discretion under Rule 501 is limited to the development of privileges extant in the common law, we affirm the district court's denial of the motion to quash subpoenas of Doe's psychiatric records. . . . we decline to reach the merits of the efficacy of the psychotherapist-patient privilege by this holding, but we do opine that if such a privilege is to be recognized in federal criminal proceedings, it is up to Congress to define it, not this court"), *cert. denied*, 493 U.S. 906, 110 S.Ct. 265, 107 L.Ed.2d 214 (1989); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988) ("evidentiary privileges in federal criminal cases are governed by common law . . . neither common law nor statutory law provides for any type of physician-patient privilege"), *cert. denied*, 489 U.S. 1084, 109 S.Ct. 1542, 103 L.Ed.2d 846 (1989).

This approach appears too rigid. Although Congress in Rule 501 makes reference to the common law, that does not mean that it intended to arbitrarily freeze privilege law in its 1974 state. To the contrary, the Supreme Court has found, and the legislative history suggests, that Congress enacted Rule 501 to allow the courts maximum flexibility in addressing privilege questions on a case-by-case basis. *See United States v. Gillock*, 445 U.S. 360, 367, 100 S.Ct. 1185, 1190-91, 63 L.Ed.2d 454 (1980)[19]; Statement by the Honorable William L. Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, Upon Presenting the Conference Report on H.R. 5463 to the House for Final Consideration 3 (December 18, 1974) ("Rule 501 is not intended to freeze the law of privilege as it now exists . . . [it] is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis"), *reprinted in* 1974 U.S.C.C.A.N. 7108, 7110. In fact, the legislative history suggests that, when it decided not to include a specifically enumerated psychotherapist-patient privilege, Congress recognized and approved of the application of such a privilege under certain circumstances:

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[19] The Court in *Gillock* also suggested that inclusion of a particular privilege in the Judicial Conference's proposed draft of enumerated privileges weighed in favor of recognizing the privilege under Rule 501.

> . . . It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S.Rep. No. 93-1277, 93d Congress, 2d Session 9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059.

In the abstract, "in light of reason and experience," I am convinced that "a psychotherapist-patient privilege of some form furthers sufficiently important and overriding interests so that recognition of the privilege is appropriate under Rule 501." *In re Grand Jury Subpoena*, 710 F.Supp. 999 (D.N.J.1989), *aff'd*, 879 F.2d 861 (3d Cir. June 27, 1989). Recognition of such a privilege would serve at least two important interests: effective psychiatric treatment[20] and pri-

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[20] The most common articulation of the effective treatment, or utilitarian, justification for the privilege was quoted by the Sixth Circuit in the primary case recognizing the privilege:

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of exceptions to this general rule . . . there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.
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> Report No. 45, Group for the Advancement of Psychiatry 92 (1960), *quoted in* Advisory Committee's Notes to Proposed Rules, 56 F.R.D. at 242.

In re Zuniga, 714 F.2d 632, 638 (6th Cir.), *cert. denied*, 464 U.S. 983, 104 S.Ct. 426, 78 L.Ed.2d 361 (1983); *see also In re Grand Jury Subpoena*, 710 F.Supp. 999, 1006-07 (D.N.J. 1989), *aff'd*, 879 F.2d 861 (3d Cir. June 27, 1989).

Some Commentators have questioned the empirical basis for this justification, which "derives from an essentially Freudian model of psychoanalysis." Note, *Developments in the Law—Privileged Communications*, 98 Harv.L.Rev. 1450, 1542-44 (1985); *cf.* Shuman and Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist Privilege*, 60 N.C.L.Rev. 893, 919-20 (1982). Moreover, it is clear that Congress' decision to pass Rule 501 rather than the Advisory Committee's version (which included specifically enumerated privileges of specifically articulated scope), as well as its suggestion that the rules of privilege be adopted on a "case-byvacy.[21] At the same time, it would impair the truth-seeking process by shielding potentially relevant evidence from the fact-finder, and ultimately limit the effectiveness of federal prosecutions. I am persuaded by the courts and commentators that have argued that in some cases, the former interests outweigh the latter. *See, e.g., In re Doe*, 964 F.2d 1325, 1328 (2d Cir.1992); *In re Zuniga*, 714 F.2d 632, 639 (6th Cir.), *cert. denied*, 464 U.S. 983, 104 S.Ct. 426, 78 L.Ed.2d 361 (1983); *Grand Jury Subpoena*, 710 F.Supp. at 1012; *Cunningham v. Southlake Center for Mental Health, Inc.*, 125 F.R.D. 474, 477 (N.D. Ind. 1989) ("[i]t seems clear that the Seventh Circuit would recognize a psychotherapist-patient [privilege] in the present case because the information sought regarding Cooper's sessions with Dopson and her alleged

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case" basis, undermines any utilitarian justification for the privilege. Individuals undergoing therapy are not as likely to rely on the existence of a psychotherapist-patient privilege when its application and scope varies from case to case and from district to district.

Notwithstanding these reservations, I do believe that the utilitarian justification holds some intuitive appeal. The reservations are important to keep in mind, however, when applying the privilege in any individual case.

[21] The cases reference two aspects of the constitutional protection of privacy:

> One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977), *cited with approval in In re Grand Jury Subpoena*, 710 F.Supp. 999, 1008 (D.N.J.), *aff'd*, 879 F.2d 861 (3d Cir. June 27, 1989). Both aspects are implicated when statements made to a psychotherapist are disclosed. *See Grand Jury Subpoena*, 710 F.Supp. at 1008-09.

revelations to Dopson involve 'substantial accounts of therapy sessions'") (citing *In re Pebsworth*, 705 F.2d 261, 263 (7th Cir.1983)); Jack B. Weinstein and Margaret A. Berger, *Weinstein's Evidence* 504-21—504-23 (1993); Note, *Developments in the Law—Privileged Communications*, 98 Harv.L.Rev. 1450, 1548-55 (1985). Thus, the court will recognize the psychotherapist-patient privilege.

The decision to recognize the psychotherapist-patient privilege does not end the court's inquiry, however. Privileges judicially created or recognized under Rule 501 are not absolute. This is especially true with respect to the psychotherapist-patient privilege, which has been treated (by those courts that have recognized it) as "highly qualified." *See In re Doe*, 964 F.2d at 1328 ("[i]ndeed, the privilege amounts only to a requirement that a court give consideration to a witness's privacy interests as an important factor to be weighed in the balance in considering the admissibility of psychiatric histories or diagnoses"). Cf. *Zuniga*, 714 F.2d at 640; *Grand Jury Subpoena*, 710 F.Supp. at 1013-14; *Cunningham*, 125 F.R.D. at 476-77 (all recognizing the privilege in the abstract, but declining to apply it to preclude discovery or admissibility). Consistent with the case-by-case approach mandated by Rule 501, the court must now consider whether, in the instant case, the privilege should apply to D.F.'s statements.

Courts applying the privilege have limited its scope in at least two ways. Some courts have applied an interest-balancing analysis, while others have displayed a definitional analysis.[2] Under both approaches, the focus, as I have described above, has been on limiting, or "qualifying," the scope of the privilege. These limits present serious difficulties for D.F.'s invocation of the privilege.

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[2] Under what I have called a "definitional" analysis, the court adopts and applies to the individual factual situation a

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certain definition of privileged communications and a set of exceptions to the privilege. *See Cunningham v. Southlake Center for Mental Health, Inc.*, 125 F.R.D. 474, 477 (N.D. Ind. 1989); *cf. In re Grand Jury Subpoena*, 710 F.Supp. 999, 1013 (D.N.J.1989) ("[i]ndeed, this case suggests the need to expand the range of exceptions to the privilege beyond those contained in Proposed Rule 504"), *aff'd*, 879 F.2d 861 (3d Cir. June 27, 1989). For most courts, such an analysis will differ little from an interest-balancing analysis, as the contours of the definition of privileged communications and the scope of the exceptions will be based on a balancing of the interests at stake. *See, e.g., Grand Jury Subpoena*, 710 F.Supp. at 1013-15 (creating an exception to the Advisory Committee's Proposed Rule 504 based on the weight of the interests at stake).

In my discussion below, I apply an interest-balancing analysis, and arrive at the conclusion that the privilege should not be applied in this case. It is worth noting, however, that the result would be no different under a definitional approach. D.F. would have difficulty showing that her statements (1) were confidential; (2) were made to medical personnel covered by the privilege; and (3) would not be excepted from the privilege (a) based on a criminal trial exception, (b) based on a homicide trial exception, (c) based on a child abuse exception, or (d) based on an exception for individuals posing dangers to others. *See generally* Proposed Rule 504, *reprinted in* Jack B. Weinstein and Margaret A. Berger, *Weinstein's Evidence* 504-1, 504-1-2 (1993); *Cunningham v. Southlake Center for Mental Health, Inc.*, 125 F.R.D. 474, 477 (N.D. Ind. 1989) (absent showing of close supervision, extension of privilege to communications with social worker is unwarranted); Brian Domb, *I Shot the Sheriff, but Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J.L. & Health 209 (1990/91) (discussing the scope of the privilege and of the various exceptions).

Under an interest-balancing approach, the court must consider the extent to which the justifications for the privilege—the interests in effective therapy and in privacy—are promoted under these facts, and whether those interests outweigh the Government's (and, indeed, the system's) need for the information. Several aspects of this case suggest that the utilitarian gains from the privilege would be minimal. First, the interest in effective therapy will only be served to the extent that D.F., a fourteen year-old girl, understood the implications of disclosure. Although she had had some experience in the justice system, it is not clear that D.F. realized the serious consequences a charge of murder would bring. Second, to the extent that she did understand the consequences of disclosure, there is evidence in the record to suggest that she believed that the staff at the Center was required to disclose her statements, i.e., that the privilege would not protect her statements. To the extent that that is the case, the privilege would have been irrelevant; it would not have served any utilitarian purpose. Third, to the extent that D.F.'s "therapy" at the Center was compelled or coerced (see discussion below), the existence of the privilege likely provided only marginal utilitarian gains.

Application of the privilege in this case would do very little to promote privacy interests. The facts of this case suggest that, regardless of whether this court finds that D.F.'s statements were privileged, her personal privacy has already been seriously compromised. The statements have already been widely disseminated amongst both governmental officials and other patients. Moreover, any residual privacy concerns the court might have are tempered by the private nature of this juvenile proceeding.[23]

Under the facts of this case, application of a psychotherapist-patient privilege would also do very little to promote personal autonomy. Because D.F. is a juvenile, her decisional independence in matters of physical and mental health is limited anyway; many of these decisions will be made by parents, relatives, or guardians. Moreover, D.F. didn't appear to have any chance to exercise what little decisional independence she did have; she was admitted to the Center as a direct result of her involvement with the criminal justice system.[24]

On the other hand, the interests weighing against the privilege in this case are considerable. The Government believes that the two infants involved were murdered. D.F.'s statements are clearly relevant to that charge. In fact, the Government has suggested that that charge cannot be sustained without that evidence.[25] Thus, nondisclosure would significantly impair both law enforcement interests and a general interest in the truth-seeking process.

In sum, disclosure of D.F.'s statements would not significantly impact utilitarian or privacy interests.

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[23] Although the Magistrate has granted media access to the proceedings, that access is subject to strict limitations.

[24] As I discussed earlier, D.F. did have some control over her status as a patient at the Center. Moreover, she also had some control over the extent to which she would cooperate with staff and participate in treatment. Nevertheless, her overall decisional independence was very limited.

[25] "This action [the Magistrate's suppression of D.F.'s statements], if upheld, would result in the termination of the government's case." Government's Objection to Magistrate's Recommendation at 2.

On the other hand, nondisclosure would seriously impact Government law enforcement interests as well as the truth-seeking process that is an integral part of our justice system.

Ultimately, this case should not be decided on nonconstitutional grounds. Absent the constitutional dimension of this case, I would be extremely reluctant to suppress D.F.'s statements. If D.F. were a critical defense witness in a murder case, and the Government could not impeach her without her statements to her psychotherapist, I would not hesitate to order or allow disclosure. This case is only difficult because D.F.'s statements amounted to a confession of murder. A confession made under circumstances such as those present here inherently raises constitutional concerns. This case should be decided based on those concerns.

II

In his recommendation, the Magistrate found no violation of the Fifth Amendment's protections against self-incrimination. D.F. objected to this aspect of the recommendation.

The Fifth Amendment provides an absolute privilege against self-incrimination in a criminal trial: "nor shall any person . . . be compelled in any criminal case to be a witness against himself". Although the question has never been clearly addressed by the Supreme Court, there seems to be little doubt that the privilege applies in juvenile proceedings. *See In re Gault*, 387 U.S. 1, 30- 31, 87 S.Ct. 1428, 1445, 18 L.Ed.2d 527 (1967); *Fare v. Michael C.*, 442 U.S. 707, 717-18, 99 S.Ct. 2560, 2567-68, 61 L.Ed.2d 197 (1979); *United States v. Fowler*, 476 F.2d 1091, 1092 (7th Cir. 1973).

As a general matter, the Fifth Amendment privilege against compelled self-incrimination is not self-executing; "it may not be relied upon unless it is invoked in a timely fashion." *Roberts v. United States*, 445 U.S. 552, 559, 100 S.Ct. 1358, 1364, 63 L.Ed.2d 622 (1980). The *Miranda* warning of the right to remain silent is a limited exception to this general rule; it doesn't "apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Id.* at 560, 100 S.Ct. at 1364.

D.F. did not invoke her privilege against self-incrimination.[26] On the other hand, she was not provided with any *Miranda* warnings. Thus, D.F.'s privilege against self-incrimination was violated if and only if she was subjected to "custodial interrogation" for the purposes of *Miranda*.

D.F. makes a strong argument both that she was in custody and that the "therapy" to which she was subjected was the functional equivalent of interrogation. Clearly, her freedom of action was curtailed in a significant way. *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). Moreover, it could be argued that she was subject to the functional equivalent of express questioning during her therapy sessions. *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297 (1980). Certainly, the staff at the center should have known that their practices were "reasonably likely to elicit an incriminating response" from D.F. *Id.* at 301, 100 S.Ct. at 1689.

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[26] D.F. did invoke her privilege against self-incrimination on April 22. (Ex. 12.) Any statements made after that time could be suppressed on that basis.

The Court in *Miranda* was concerned with changing police procedures. It described its concerns over atmospheres that are "police-dominated". *Miranda,* 384 U.S. at 456, 86 S.Ct. at 1618. It illustrated the problem it was addressing through extensive reference to police manuals. *Id.* at 448-55, 86 S.Ct. at 1614-17. Most importantly, it created a bright-line rule that could be easily translated to police manuals and police training sessions. *Id.* at 479, 86 S.Ct. at 1630.

Courts have been reluctant to expand the *Miranda* requirements to questioning by officials outside the law enforcement community.[27] Whether this reluctance is explained in agency terms, *see, e.g., United States v. Eide,* 875 F.2d 1429, 1433-44 (9th Cir. 1989);

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[27] At first glance, the logic behind the Supreme Court's opinion in *Estelle v. Smith,* 451 U.S. 454, 466-67, 101 S.Ct. 1866, 1874-75, 68 L.Ed.2d 359 (1981), would appear to apply equally to the instant case. In that case, the Court held that the results of a court-ordered psychiatric examination could not be used as affirmative evidence to persuade a jury to return a sentence of death. *Id.* As in *Estelle,* during therapy sessions, D.F. was clearly "not in the presence of [a] perso[n] acting solely in . . . [her] interest." *Id.* at 467, 101 S.Ct. at 1875 (citing *Miranda v. Arizona,* 384 U.S. 436, 469, 86 S.Ct. 1602, 1625, 16 L.Ed.2d 694 (1966)). I am reluctant to apply *Estelle* here, however, for at least three reasons: first, in *Estelle,* the defendant was clearly in custody (he was in prison); second, the psychiatrist in *Estelle* was working directly for law enforcement; third, as a practical matter, because of the direct law enforcement involvement in *Estelle,* requiring warnings still served the fundamental purpose of *Miranda* (albeit in a new context).

The court notes, however, that in a case similar to the one at bar, a juvenile counselor who was required to report any confessions to the police was considered "an instrument of the police," and thus, a juvenile who had confessed to him was entitled to *Miranda* warnings. *See Commonwealth v. A Juvenile,* 402 Mass. 275, 521 N.E.2d 1368, 1370-72 (1988).

United States v. Webb, 755 F.2d 382, 391-92 (5th Cir.1985); *United States v. Capra*, 501 F.2d 267, 282 n. 4 (2d Cir. 1974), *cert. denied*, 420 U.S. 990, 95 S.Ct. 1424, 43 L.Ed.2d 670 (1975); *United States v. Antonelli*, 434 F.2d 335, 336-37 (2d Cir. 1970); *Corngold v. United States*, 367 F.2d 1, 5 (9th Cir. 1966), in custody terms, *see, e.g., United States v. Rucker*, 435 F.2d 950 (8th Cir. 1971); Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 6.10(c) (1984 and Supp. 1991) (suggesting that most of the agency cases could also be explained in terms of custody), or in interrogation terms, *see, e.g., United States v. Morales*, 834 F.2d 35, 38 (2d Cir. 1987), it ultimately comes down to a reluctance to apply a bright-line prophylactic rule to situations where there is no direct law enforcement involvement.

Imposing a *Miranda* requirement on the staff at the Center would be inconsistent with the motivations behind *Miranda*'s essentially inculcative approach.[28] The history of abuse that motivated the Court in *Miranda* is conspicuously absent here. The court is not aware of any widespread pattern of overreaching by mental health officials seeking to elicit confessions. Moreover, any requirement that the court might fashion here would be anything but bright-line. Thus, the court will not decide this case on *Miranda* grounds.

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[28] At least with respect to the admissions that D.F. made to Ms. K. on April 5. It is possible that such *Miranda* warnings should have been given after April 16, when Ms. K. began "cooperating" with the F.B.I. Given the nature of the court's holding in Part III, I need not decide that issue.

III

D.F. also argues that use of her statements against her would violate the Due Process Clause of the Fifth Amendment. In his recommendation, the Magistrate did not address this aspect of D.F.'s motion.

The Due Process Clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." The guarantees of due process apply to juvenile proceedings. *Gault*, 387 U.S. at 30, 87 S.Ct. at 1445. The admission of involuntary confessions violates due process. *See, e.g., Miller v. Fenton*, 474 U.S. 104, 109-10, 106 S.Ct. 445, 449-50, 88 L.Ed.2d 405 (1985).

"[A] confession will be adjudged 'voluntary' if the government demonstrates that under the totality of the circumstances and by a preponderance of the evidence that it was not secured through psychological or physical intimidation but rather was the 'product of a rational intellect and free will.'" *United States v. Montgomery*, 14 F.3d 1189, 1194 (7th Cir. 1994). *Cf. Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S.Ct. 274, 280, 4 L.Ed.2d 242 (1960); *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S.Ct. 735, 741, 5 L.Ed.2d 760 (1961).[29] The "crucial question" is whether the defendant's will was overborne at the time he confessed, "and the answer lies in whether the authorities obtained the statement through coercive means." *Montgomery*, 14 F.3d at 1194. In deciding this question, the court must consider both "the characteristics of the accused and the details of the interrogation in determining whether a reasonable person would feel coerced." *Id.* at 1194-95. In reviewing the totality of the circumstances, the court may look at a number of factors, including "the age of the defendant, his lack of education or low intelligence, the lack of any advice to him of his constitutional rights, the length of his detention, the repeated and prolonged nature of the questioning, and the use of physical punishment." *Id.* at 1194-95.

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[29] "Its essence is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Culombe v. Connecticut*, 367 U.S. 568, 582, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (1961) (citing, among other authorities, *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960)).

The Government argues that, as a threshold matter, D.F.'s statements were not involuntary because there is no evidence that they were brought about by police overreaching. In *Colorado v. Connelly*, the Supreme Court, in reversing the Colorado courts' suppression of a confession as involuntary, held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." 479 U.S. 157, 167, 107 S.Ct. 515, 521-22, 93 L.Ed.2d 473 (1986). The Government argues that, because the police were not directly or indirectly involved in eliciting D.F.'s statements, those statements cannot be considered involuntary under *Connelly*.

This narrow reading of *Connelly* misses the point. At first blush, the language of the opinion appears to suggest a narrow police or law enforcement focus. *See Connelly*, 479 U.S. at 163-65, 107 S.Ct. at 519-20. Upon closer scrutiny, however, the opinion and facts of the case suggest otherwise. In *Connelly*, the Colorado Supreme Court had found that, because of the defendant's mental state at the time, his confession had not been "the product of a rational intellect and free will." *Id.* at 162, 107 S.Ct. at 519. As a result, the confession was deemed "involuntary," notwithstanding the fact that the case involved no government wrongdoing or coercion. *Id.* The Supreme Court reversed, holding that government coercion or overreaching was a necessary prerequisite to an involuntariness finding:

> The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between the coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other. The flaw in respondent's constitutional argument is that it would expand our previous line of 'voluntariness' cases into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that the governmental conduct coerced his decision.

Id. at 165-66, 107 S.Ct. at 521. The Court in *Connelly* simply wanted to make it clear that confessions unaffected by outside governmental coercion or coerced by private citizens should not be suppressed as involuntary.

The Government's reading of *Connelly* would, in this court's view, lead to absurd results. State legislators could enlist government employers, welfare workers, and mental health workers as surrogate interrogators by setting up mandatory reporting requirements.[30] As long as the police had no involvement in this enlistment, Due Process protections would not bar the use of any incriminating statements. Such an approach simply does not pass muster in today's world. Just as the courts have recognized that the Constitution protects against psychological, as well as physical coercion,[31] so must they recognize that in this day of extensive government involvement in people's lives, State coercion is not the exclusive province of the police department.[32]

I do not mean to suggest that *Connelly* does not require a threshold inquiry into State coercion. I only suggest that that inquiry can go beyond the actions of traditional "law enforcement" personnel[33] to the actions of the juvenile court system, the legislature, other government officials, and the reasonable feelings of the defendant.

In the instant case, that inquiry reveals the necessary official coercion, "the essential link between the coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other."[34] *Connelly*, 479 U.S. at 165, 107 S.Ct. at 520-21. Clearly, this case involves coercion—indeed, a bit of overreaching—by government officials. Staff members at the Center were either enlisted or volunteered[35] to act as law enforcement surrogates in eliciting confessions from troubled teens. There is extensive evidence in the record of the close relationship between staff at the Center and Protective Services, the juvenile court system, and the F.B.I. There is also evidence that many of the staff at the center saw themselves as an arm of law enforcement. Moreover, it would be totally reasonable for a child of D.F.'s age, intelligence, and mental state to believe that she was being "encouraged" to talk by, effectively, law enforcement personnel.

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[30] In fact, under the Government's reading, *Connelly* would bar an involuntariness finding in the instant case even if the Wisconsin reporting requirements were mandatory.

[31] *See Spano v. New York*, 360 U.S. 315, 321, 79 S.Ct. 1202, 1206, 3 L.Ed.2d 1265 (1959).

[32] This is not inconsistent with the court's reluctance to find the necessary official action here to trigger *Miranda*. *See supra* Part II. Given the history and motivation behind the *Miranda* warnings, certain State action can trigger due process protections without triggering *Miranda* protections. *See, e.g., United States v. Goldberger*, 837 F.Supp. 447, 452-53 (D.D.C.1993) (no *Miranda* required because no custody, but confession found involuntary).

[33] I.e., police, other criminal investigators, and prosecutors.

As a result, I must consider whether D.F.'s confession was "voluntary." As I noted above, that determination must be made based on the totality of the circumstances, including the characteristics of the accused and the details of the interrogation. *Montgomery*, 14 F.3d at 1194-95. Ultimately, the court must determine whether D.F.'s will was overborne at the time she confessed. *Id.* at 1194.

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[34] Initially, the court notes that given the close relationship between staff at the Center and Protective Services, the juvenile court system, and the F.B.I., the agency relationship that the Government reads into *Connelly* may in fact exist. Given the foregoing analysis, however, the court need not decide that question.

[35] Whether one thinks the staff members were enlisted by the state or volunteered depends upon one's reading of the Wisconsin reporting provisions. As I discussed earlier, I am not convinced that the Wisconsin reporting provisions permit disclosure of confessions such as D.F.'s.

Because D.F. was a juvenile at the time of her confession, the court must exercise "great care . . . to insure the voluntariness" of her confession. *Woods v. Clusen*, 794 F.2d 293, 298 (7th Cir. 1986) (citing *Haley v. Ohio*, 332 U.S. 596, 601, 68 S.Ct. 302, 304, 92 L.Ed. 224 (1948)); *cf. Gault*, 387 U.S. at 55, 87 S.Ct. at 1458.

D.F., a deeply disturbed girl of 13, was admitted against her will into a program at a locked facility in [redacted] County. She suffered from a pervasive mistrust of authority figures. Staff at the Center went to great lengths to encourage and develop her trust. They also employed a wide range of tactics to "encourage" her to talk about the crimes she had committed. Privileges were accorded based on, among other things, frank admission of crimes. Criminal admissions were forgiven subject to continued cooperation and disclosure. Individual staff questioned D.F. directly about her past crimes. Protective Services Staff were provided with information about her crimes, and were allowed to question her about further crimes.

Staff at the Center were aware that D.F. was suspected of playing a role in her cousins' deaths. They felt that she needed to talk about her involvement, both for therapeutic and punitive reasons. Consequently, they "encouraged" her to talk about it.

D.F. resisted this "encouragement" for four months. This may or may not have been due to the statements of certain staff, who warned D.F. that they might have to "report" any incriminating statements she made. There is no evidence, however, that D.F. was ever fully warned of the consequences of a confession. Moreover, the evidence suggests that the warnings were minimal, and that, in any event, they never included any mention of D.F.'s Fifth Amendment privilege of self-incrimination.

Finally, in April 1993, D.F. confessed to killing her two young cousins. Staff immediately reported the confession to Protective Services, and later cooperated with the F.B.I.'s investigation. At the same time, staff pressured D.F. to repeat and expand upon her confession, even after she had retained an attorney and invoked her Fifth Amendment privilege against self-incrimination. As a result, D.F. made a number of additional incriminating statements in the ensuing weeks.

After considering the totality of the circumstances, I conclude that D.F.'s inculpatory statements were secured through psychological coercion and were not the "product of a rational intellect and free will." *Blackburn*, 361 U.S. at 208, 80 S.Ct. at 280. Given the circumstances under which they were employed, the various "encouragement" techniques employed by the staff were highly coercive. A reasonable person of D.F.'s age, intellect, and mental state would have felt coerced. In sum, D.F.'s confession was not "voluntary" within the meaning of the Due Process Clause of the Fifth Amendment.

CONCLUSION

For the reasons set forth above, the court finds that Government use at trial of statements made by D.F. in the course of her therapy would violate the Due Process Clause of the Fifth Amendment. Accordingly,

IT IS ORDERED that D.F.'s motion to suppress evidence be and the same is hereby **GRANTED**. All statements made to any counselor, therapist, or treatment worker at the [redacted] County Mental Health Center are hereby suppressed.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 93-Cr-202

UNITED STATES OF AMERICA, PLAINTIFF

v.

D.F., DEFENDANT

[Filed: Apr. 13, 1994]

RECOMMENDATION TO THE HONORABLE J. P. STADTMUELLER AND ORDER

Two infant children, sisters, were tragically found dead in their parents' house six days apart. The medical examiner attributed the first death to Sudden Infant Death Syndrome and the second death to influenza. A subsequent opinion offered by a different medical examiner found both deaths to be consistent with suffocation. On November 17, 1993, the United States filed a two count information charging D.F., a juvenile, in each count with murder in the second degree, in violation of 18 U.S.C. § 1111, 1153 and 5031. D.F. made an initial appearance before this court on November 18, 1993. A delinquency hearing is scheduled before Judge J.P. Stadtmueller on April 25, 1994, with a final prehearing conference to be conducted on April 20, 1994. Currently pending before the court are D.F.'s motions to suppress evidence, motion for a jury trial and motion for notice of uncharged misconduct evidence. The motions have been fully briefed and are ready for resolution.

Motion to Suppress Statements

D.F. moves to suppress all statements which were made to any counselor, therapist or treatment worker attributed to D.F. while she was confined in the [——] Mental Health Center. The court conducted an evidentiary hearing regarding this motion commencing February 3, 1994. Testifying at the hearing were treatment counselors B[——] K[——] and R[——] M[——], registered nurse P[——] S[——] [——], and nursing assistants L[——] B[——], S[——] A[——], D[——] [——], S[——] V[——] and D[——] M[——]. All of these witnesses were employed by the [——] Mental Health Center during the period of D.F.'s treatment.

The parties have agreed upon many of the underlying facts, and the court commends the parties for their extensive efforts in this regard. The court would further note that the testimony presented few, if any, factual disputes. Rather, the dispute between the parties focuses upon the significance of the events which transpired. The court makes the following findings of fact:

At all times relevant to the suppression motion, D.F. was a juvenile, thirteen to fourteen years of age. On December 4, 1992, D.F. was admitted to the locked adolescent unit of the [——] Mental Health Center where she resided at all times relevant to the suppression motion. Her admission was voluntary, although she was under court supervision at the time, and a condition of her supervision was that she cooperate with recommended counseling; had she not been voluntarily admitted, she may have been ordered into treatment.

The conditions of confinement have certain similarities to a low security custodial setting. The clients are not permitted to leave the adolescent unit freely, although they may generally move about within the unit. The clients are outside of the unit on many occasions, including visits to the main dining room and the school. At the age of thirteen, D.F.'s guardian could sign her out for up to four hours if approved; after turning fourteen on March 17, 1993, D.F. could sign herself out for this period, if approved. A client can leave permanently, but only after a forty-eight hour waiting period which allows the medical director an opportunity to seek involuntary placement under Wisconsin law. After returning from a pass, clients are subjected to strip searches for contraband. At various times, a client might be confined to her room for disciplinary reasons or, when suicide prevention is a concern, may not be allowed out of the unit unescorted.

R[——] M[——] is an Alcohol and Drug Abuse Counselor at the facility. On December 11, 1992, M [——] met with D.F. and explained the rules the procedures regarding matters of confidentiality. At the time of D.F.'s admission, the [——] Mental Health Center was developing its policies with regard to informing patients of matters relating to child abuse which would not be kept confidential. M[——] explained to D.F. that "any information about suspected child abuse or neglect . . ." was not protected by confidentiality. D.F. acknowledged this in writing and M[——] testified that D.F. did not appear to have any difficulty understanding this explanation. *See* Exhibit B-1.

During the next week, M[——] was in contact with N[——]M[——], a caseworker from the [——] County Department of Human Services, regarding D.F.'s sexual activity with adult men. During their discussions, M[——] told M[——] that D.F. was suspected in the death of two of her cousins and that there were also concerns of D.F. being violent toward other cousins, breaking arms or legs. M[——] was advised that nothing had ever been proven and the deaths were attributed to Sudden Infant Death Syndrome or influenza. Exhibit B-2.

M[——] testified that this information caused him to have a heightened sensitivity to the issues of confidentiality and reporting. At this point in time, M[——] believed that any information concerning the abuse of a juvenile, either a juvenile patient who was the subject of abuse or a patient who caused the abuse of a juvenile, had to be reported to the authorities. Consequently, M[——] made a point of telling D.F. that any disclosures about hurting or killing a child would have to be reported to Protective Services and ultimately to law enforcement. To this end, M[——] told D.F. that she should be cautious about what she said, and that it was her choice to not speak about any incidents. M[——] estimated that he warned D.F. approximately ten times and recorded notes about his warnings in her chart about four times. *See, e.g.*, Exhibits A-1, B-4.

D.F. was aware that her admissions would be reported and for several months she avoided disclosing her actions. On January 7, 1993, for instance, D.F. was asked if she had ever murdered anyone and responded, "I can't answer that." Defense Exhibit 11. On January 8, 1993, D.F. was asked if she had ever murdered anyone and she did not respond. Exhibit B-3. Around the same time, she told staff members that if they knew all the people she had hurt it would get her in trouble. Tr. 239. Another time she told her aunt that if everything she had done were disclosed she would have to go to jail for a long time. Exhibit B-4. On March 17, 1993 D.F. told a staff member, when encouraged to talk with staff, "I can't. You have to report what I say." Exhibit C-5.

Despite D.F.'s reluctance to discuss her past actions, the staff continued its efforts to have D.F. truthfully verbalize her past conduct. Ultimately, over a period of time, D.F. made limited disclosures about her past conduct and alluded to the severity of her conduct. For instance, on January 1, 1993, D.F. was instructed by a Person In Charge ("PIC") for a particular shift to make a list of all the people she had hurt in the past, which was embodied in Exhibit C-3. See also Exhibit D-1. After D.F. disclosed that she broke her cousin's arm, D.F. was told, on March 2, 1993, that a tentative decision had been reached by the [——] County Human Services Department to refrain from charging D.F. for this act of violence toward her cousin if D.F. continued to make treatment progress.

On April 5, 1993, she made a specific statement regarding her fatally assaultive behavior toward her two [——]. This was followed by several similar disclosures over the next several weeks. D.F.'s disclosures regarding her [——] appear to have been a culminating response to continuing urging and encouragement she was given as part of her treatment by the hospital staff to fully disclose the wrongs of her past.

D.F.'s treatment program had several express objectives, including to develop trust and avoid telling lies. To this end, the clients are given a variety of incentives to discuss personal matters. For instance, each client is instructed to have at least one contact with the PIC for a particular shift. Failure to initiate a contact or to follow instructions could result in either the loss of points or the award of fewer points under a point based incentive system. Likewise, the clients were awarded or assessed points for their participation in group sessions. The loss of points could lead to the loss of various privileges, or to disciplinary measures such as "Base O," in which the client was confined to her room for a period of time, had to dress in her hospital robe and complete a particular reading and writing assignment.

D.F.'s disclosure on April 5, 1993 occurred while D.F. was participating in a group session with other juveniles, led by B[——] K[——]. The juveniles in the group were discussing serious things they had done in their lives. One of the group was discussing an incident and the others in the group were telling him that he should be more honest. D.F. responded by saying words to the effect of "Oh, you think what you did is bad, let me tell you what I did. . ." D.F. proceeded to disclose details of the events surrounding the two deaths.

On April 6, 1993, the staff conducted a meeting in which K[—] told persons present about D.F.'s disclosures. D[——]V[——], a liaison from the Department of Social Services, went, without any staff discussion, to the telephone and reported D.F.'s disclosures to Protective Services. The matter made its way through various channels and ultimately, the F.B.I. initiated an investigation.

Meanwhile, there were ongoing discussions amongst the staff as to whether this matter should have been reported, in what fashion and what level of cooperation was appropriate. Initially it was believed that there was no choice under Wisconsin law but to report D.F.'s disclosures. Around April 16, 1993, however, K[——] learned that the confidentiality and reporting law, Sec. 48.981, Wis. Stat. does not mandate, but may permit, reporting when a juvenile discloses that she was the perpetrator of abuse. Reporting is only mandatory to the extent that a juvenile admits being the victim of abuse.

In the days and weeks which followed, D.F. continued to discuss the deaths with the treatment staff on various occasions. On April 22, 1993, K[—-] was contacted by an attorney in [——] who had been appointed to be D.F.'s public defender, K[——] was present when the attorney spoke with D.F. and told D.F. not to speak with anyone about the case—either law enforcement or tribal authorities. D.F. signed a statement indicating that she did not want to speak with anyone unless her attorney was present. Defendant's Exhibit 12.

The infants' deaths were the topic of discussion between K[——] and D.F.'s family on April 23, 1993 and again on May 10, 1993. Exhibit A-6, A-8. As of April 23, 1993, K[——] was considering the appropriate level of cooperation with the F.B.I. and advised the family to "keep discussions of the death confined to the session, so that they could be protected by confidentiality."

Analysis

The parties focus upon the issue of whether the admission of D.F.'s statements would be in violation of the Fifth Amendment and her rights under *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). D.F. contends that over the course of her treatment she was not free to leave, that the treatment staff were acting as agents of the police in memorializing and reporting incriminating statements and that the course of her treatment constituted interrogation, intending to get her to make inculpatory admissions. The government contends that her statements were voluntary disclosures made free from any coercive effects and that, although D.F. was never advised of her *Miranda* rights, she was not subjected to custodial interrogation by law enforcement which would invoke the protections of *Miranda* and the sanctions of the exclusionary rule.

A person in custody must be informed, prior to interrogation, of her right to remain silent and to have a lawyer present. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). In a conventional context, *Miranda* deals with the interrogation of an accused, alone in an investigator's office, in which the "atmosphere suggests the invincibility of the forces of the law." 384 U.S. at 449-50.

The present case is not the conventional context of interrogation. However, the juvenile contends that the entire five month course of her residential treatment in the locked adolescent unit of the Mental Health Complex was equivalent to custodial interrogation and therefore, the safeguards of *Miranda* apply.

This is a case about privilege; the privilege of communications which may arise between a patient and a psychotherapist, and in a related sense, the privilege against self-incrimination. Unquestionably, this case presents a tragic situation. Two infants are dead, and their family grieves. D.F.'s background and present circumstances are also tragic. At a minimum, she has very serious emotional and psychological problems. From a legal standpoint, the case implicates rights which are the very foundation of our constitution. As stated in *Miranda*, 484 U.S. at 460 (citations and internal quotations omitted), the privilege against self-incrimination,

> developed as one which groped for the proper scope of governmental power over the citizen . . . the privilege has come rightfully to be recognized in part as an individual's substantive right, a right to a private enclave where he may lead a private life. . . . [T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance, to require the government to shoulder the entire load . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel simple expedient of compelling it from his own mouth.

D.F. was in treatment because she had demonstrated significant problems in her psychological development. Communications between a patient and a psychotherapist in a treatment setting typically involve far more intensely personal information than communications to other kinds of doctors, *Doe v. Diamond*, 964 F.2d 1325, 1328 (2d Cir. 1992), delving into matters at the core of the human personality. It is notable that *Miranda* was principally directed toward the use of psychological, not physical, factors involved in an interrogation, toward protecting the "inviolability of the human personality." *Miranda*, 484 U.S. at 460. This unique case presents an unusual convergence between the privilege against self incrimination and the privilege of communications between a psychotherapist and patient.

The parties focus solely upon the privilege against self incrimination. At the outset of the hearing, counsel for the juvenile indicated that the privilege question would be reserved for a motion in limine, but the facts elicited at the evidentiary hearing compel the court to start with the question of a psychotherapist-patient privilege. The court regrets that it does not have the benefit of the parties' briefing as to this issue, but given the unusual interplay of privileges and the facts of this case, the court must address the matter at this juncture.

Rule 501, Fed. R. Evid., provides that "the privilege of a witness [or] person . . . shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness [or] person . . . shall be determined in accordance with State law."

Although a juvenile is protected by many safeguards found in the criminal justice system, a juvenile proceedings is generally regarded as civil, not criminal in nature. *United States v. Parker*, 956 F.2d 169, 171 (8th Cir. 1992); *United States v. Furey*, 500 F.2d 338, 343 (2nd Cir. 1974). On this basis alone, and taking into account issues of comity as well as the much greater experience of state courts in juvenile matters, the court believes that state law appropriately provides the rule of decision. *See generally*, *Memorial Hospital for McHenry Co. v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981) ("A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges"); *United States v. Juvenile*, 599 F.Supp. 1126, 1130 (D.Or. 1984) (federal court system is ill equipped to meet the needs of juvenile offenders and deference to the state courts is appropriate).

Parenthetically, in the context of criminal proceedings, the Seventh Circuit has said that a court must decide, "in the light of reason and experience," whether any privilege applies to a particular case. *United States v. Wilson*, 960 F.2d 48, 50 (7th Cir. 1992). If this were regarded as a criminal case, to determine whether to recognize the privilege the court must balance, on a case by case basis, the purpose the privilege is meant to serve against the federal interests served by allowing the government to use the evidence. *Id.* *United States v. Diamond*, 964 F.2d 1325, 1328 (2d Cir. 1992) (finding a psychotherapist-patient privilege may exist on a case by case basis, collecting cases and noting that forty-nine states have adopted some form of a psychotherapist-patient privilege); *United States v. Burtrum*, [17 F.3d 1299, 1302] , 1994 WL 56508, *3 (10th Cir. 1994) (denying privilege on policy grounds).

Applying state law as the rule of decision as it exists in Wisconsin, Sec. 905.04(2), Wis. Stats., provides that "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of . . .

diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient . . . the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the . . . diagnosis or treatment under the direction of the physician, registered nurse . . . psychologist, social worker, marriage and family therapist or professional counselor."

Section 905.04(1)(b), [Wis.] Stats., provides: A communication . . . is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient . . . or persons who are participating in the diagnosis and treatment under the direction of the physician, registered nurse . . . psychologist, social worker, marriage and family therapist or professional counselor, including the members of the patient's family."

D.F. was working on several goals in therapy, including to develop trust and avoid telling lies. To this end, D.F. was encouraged to make full disclosures to the treatment staff of the matters with which she had difficulties. Although D.F. had been cautioned that certain information regarding abuse would be reported, this does not equate to a voluntary intent, or even acquiescence, that it be reported. The government has argued that the disclosures were made not in response to interrogation by staff, but rather as part of therapy. Accepting this as true, it is clear that D.F.'s intent was similarly therapeutic, not to have the information conveyed to the police, but to demonstrate to the staff that she was developing a trust in them by making certain disclosures. In fact, K[——] testified that D.F.'s statements were confidential client statements and advised the family to "keep discussions of the death confined to the session, so that they could be protected by confidentiality." *See also,* Exhibit F-1 ("upset about peer's lack of keeping her confidentiality from group last week . . .").

The court is aware of an unreported Wisconsin Court of Appeals case which is factually very similar to the present case. *State v. Todd F.M.*, [178 Wis. 2d 877], 506 N.W.2d 427, 1993 WL 322491 (Wis. Ct. App. August 26, 1993). Although it is of no precedental value, the reasoning is sound and provides insight into the workings of the relevant Wisconsin Statutes. In *Todd*, a juvenile was being treated for sexual contacts he had with other juveniles. During treatment he was encouraged to accept responsibility for his behavior and to be forthright about his conduct. During the course of treatment he disclosed other sexual contacts with children and wrote a number of letters admitting these contacts. The government sought to introduce these admissions against Todd, but the trial court suppressed them as privileged communications. The Court of Appeals upheld the trial court's decision in an unpublished decision.

The court in *Todd* notes that Section 905.04(4)(e), Wis. Stats. provides for an exception to what would otherwise be privileged communications where "the examination of an abused or injured child creates a reasonable ground for an opinion . . . that the condition was other than accidentally caused or inflicted by another." This exception conforms to the mandatory reporting requirement under Sec. 48.981(2), Wis. Stats. which requires the reporting of victims of abuse. As the court in *Todd* notes, "it is clear that the abused or injured child exception applies to victims of abuse and not to perpetrators. The statute's intent is to facilitate reporting of child sexual abuse for the benefit of sexual abuse victims by identifying incidents of abuse and initiating intervention." *State v. Todd F.M.*, [178 Wis.2d 877, 506 N.W. 2d 427], 1993 WL 322491 **3. This court concurs with the reasoning in *Todd*, that the perpetrator's communications are not excepted from the privilege under Section 905.04(4)(3), Wis. Stats. The court therefore concludes that D.F.'s communications are privileged.

The treatment staff acknowledges that they were under the erroneous impression that the Wisconsin Statutes required them to report abuse when the "child seen in the course of professional duties," is the perpetrator of the abuse. Sec. 48.981(2), Wis. Stats. Even if the statute, Sec. 48.981 Wis. Stats., permitted the treatment staff to report abuse to a child, the report is for the benefit of the victim of abuse. Neither Sec. 905.04(4)(e), Wis. Stats. nor Sec. 49.981 Wis. Stats. contain any express provision for waiving the perpetrator's privilege of communications.

Moreover, without limitations on the use of the information, a requirement that the psychotherapy treatment staff provide law enforcement with a confession made by a juvenile perpetrator of abuse would, in effect, conscript all treatment workers into service as skilled agents of law enforcement, capable of obtaining confessions through psychological means. This is, in effect, what occurred in this case. In fact, B[——] K[——] testified that she carefully documented D.F.'s disclosures, at least in part, because she thought she might have to testify as to these statements in court. Likewise, when D[——]

V[——] placed the telephone call to report D.F.'s confession, there was no advance discussion as to whether this would be proper or in D.F.'s best interest. Since the abuse victims were deceased, the ostensible reason in reporting appears to have been to serve law enforcement purposes. In fact, M[——] testified that some members of the treatment staff believed that D.F. would not be capable of real healing until she went through the catharsis of court proceedings.

It thus appears that the treatment staff had a dual purpose; the purifying act of D.F. first admitting to her ill deeds and then accepting and suffering the consequence of her acts. In this sense, the treatment staff acted as if they were agents of law enforcement. *See generally, United States v. McAllister*, [18 F.3d 1412, 1417-18], 1994 WL 85655, *5 (7th Cir. 1994) (For fourth amendment purposes, whether a person was acting as a government agent depends initially upon "whether the government knew of and acquiesced in the intrusive conduct," and secondly "whether the private party's purpose . . . was to assist law enforcement efforts or to further his own ends."); *quoting, United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987); *see also, Estelle v. Smith*, 451 U.S. 454 (1981) (statements made by a defendant during a state ordered psychiatric examination not admissible without *Miranda* warnings).

The court notes that D.F. was given very mixed, and seemingly conflicting, signals about her disclosures. She was told that abuse she disclosed had to be reported, but she was also told that her communications were confidential. She was encouraged to be forthright in her disclosures and when she disclosed non-lethal violent acts toward some of her cousins, she was told no charges would be brought if she continued her therapy. There is no question that the treatment staff believed, from a therapeutic standpoint, that it was necessary for D.F. to admit her wrongdoings. To this end, the staff facilitated and encouraged her to make disclosures, such as the list, Exhibit C-3, of all the people she had hurt or the inquiry, on January 8, 1993, as to whether D.F. had ever murdered anyone. Exhibit B-3. In this sense, D.F. was subjected to interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (interrogation includes "any words or actions . . . reasonably likely to elicit an incriminating response from the suspect").

Undoubtedly to D.F.'s therapeutic benefit, this was an effective setting in which to wear down her resistance and gain her confidence. While most confessions may be therapeutic, an individual still retains a constitutional right to be free from self incrimination. D.F.'s progress notes are telling:

> 12/22/92—[D.F.] stated "I just have a real problem trusting people enough to tell them what my problems are." Writer reassured client that maybe she should try [to] trust staff. (Def. Exh. 8)
>
> 1/9/93—Still talked about not trusting or getting close to people because when you trust people you end up getting hurt. (Def. Exh. 2)
>
> 4/17/93—[D.F.] asked writer, "you know I'm going to court, right?" I stated yes. She then asked what am I going to say when they ask[] me why I did it? I told her just to tell the truth and explain exactly how you felt and exactly how you did it."

It is clear that over time, D.F. grew to trust members of the treatment staff and confide in them. There is no question that D.F.'s trust was essential from a therapeutic standpoint and D.F. revealed many, if not all, of her darkest secrets in therapy. Some of the secrets revealed pertain to the current charges.

In describing the psychological factors contributing to a successful interrogation, the Court in *Miranda* specifically noted that the objective of the police is to "persuade, trick, or cajole [the subject] out of exercising his constitutional rights." *Miranda*, 384 U.S. at 455. The method was described:

> "To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. *To obtain a confession, the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired objective may be attained.' When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings.* . . . [T]he interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant.

> He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover, his family and other friends are nearby, their presence lending moral support."

Miranda, 384 U.S. at 449-50 (emphasis added)

The facial similarities between inpatient psychotherapy and the interrogation tactics discussed above give this court pause. In this sense, this case becomes most disturbing when considering D.F.'s statements on April 23, 1993 and again on May 10, 1993, in which K[——] advised the family to "keep discussions of the death confined to the session, so that they could be protected by confidentiality." Regardless of whether K[——] intended to be deceptive, the government now seeks to introduce these statements against D.F. Notably, these statements were made following D.F.'s written invocation of her *Miranda* rights.

The court does not mean to ascribe any ill faith to the treatment staff. Rather, the court means to highlight the fine line, at least in this case, between D.F.'s Fifth Amendment privilege against self incrimination and her privilege of communications between psychotherapist and patient.

As stated at the outset of this discussion, this case does not present the conventional context of interrogation. Specifically, *Miranda* and its exclusionary sanctions are to be applied when an accused is in custody or otherwise deprived of her freedom of action in any significant way. *Miranda*, 384 U.S. at 444. The courts which have considered situations amounting to custody look at such factors as the duration of the confinement, the familiarity of the setting and the control exercised by the accused. *See United States v. Hocking*, 860 F.2d 772 (interview conducted at home); *United States v. Willoughby*, 860 F.2d 15, 23-24 (2d Cir. 1988) (inmate not in "custody" when the inmate initiated the meeting, initiated conversations about crime, could terminate interview and no evidence of compulsion beyond the fact of confinement). *Schiro v. Clark*, 963 F.2d 962, 974 (7th Cir. 1992) (halfway house setting not custodial); *Minnesota v. Murphy*, 465 U.S. 420 (1984) (routine meeting between defendant and his parole officer not considered to be custodial interrogation).

D.F. was only fourteen at the time of her admissions, and had spent several months in the treatment setting where counselors worked with her to establish trust and feel comfortable revealing her inner most secrets. Her surroundings were undoubtedly familiar and D.F. had the ability to leave for limited periods of time. Nevertheless, she had significant restrictions on her freedom. D.F. knew that she would not be allowed to live at home unless she completed treatment with some degree of success and would be, in effect, penalized for keeping to herself and not opening up. The one time D.F. tried to sign herself out she was persuaded not to prior to the lapse of the 48 hour waiting period. It was essentially beyond D.F.'s ability to terminate her treatment and, to a fourteen year old, the restraints on D.F.'s freedom undoubtedly seemed significant.

Nevertheless, "juveniles, unlike adults, are always in some form of custody." *Schall v. Martin*, 467 U.S. 253, 265 (1984). Typically, a juvenile would be in the "custody" of her parents, bound to submit to the authority of a parent. If the court takes a broad view of D.F.'s confinement, she was subjected to a loss of liberties and terms of confinement for an extended period of time, and made to submit, in a sense, to the authority of the treatment itself. This court is unwilling to say, however, that she was in custody in the traditional context of *Miranda* simply by virtue of her placement in an adolescent wing. In fact, each statement was elicited in a familiar setting, comfortable enough that D.F. felt willing to "open up" to the staff.

The pervasive aspect of this case is the psychological treatment; treatment structured to elicit confession-like responses. For that reason, the court believes that this case is most properly decided as a question of psychotherapist-patient privilege, although the privilege takes on added importance because of the Fifth Amendment underpinnings. This court declines to recommend that the statements be suppressed on the basis of *Miranda v. Arizona*, but finds that permitting the introduction of D.F.'s statements in evidence against her would violate the psychotherapist-patient privilege. It is therefore recommended that the statements made by D.F. to the treatment staff be suppressed.

Motion for a Jury Trial

D.F. has requested a jury trial on the two delinquency charges. The Sixth Amendment provides criminal defendants the right to trial by an impartial jury. However, in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) a plurality of the Court found that a juvenile did not have a Sixth Amendment right to a jury in a juvenile delinquency adjudication. D.F. now asks this court to find that she is entitled to a trial by jury.

D.F. observes that juveniles are increasingly the perpetrators of serious crimes. Society has responded with juvenile detention facilities which have become more prison-like in character and the possibility of terms of incarceration extending past the age of majority. The government points out that much of the original reasoning of the Court in *McKeiver v. Pennsylvania*, as to why there was not a right to a jury trial in a juvenile matter, remains sound. Specifically, the government points to factors such as the informal, protective character of a juvenile proceeding and the limit on confinement in this case to the age of twenty-one. *See McKeiver v. Pennsylvania*, 403 U.S. at 545, 550-53. The government also observed the many types of cases in which there is no right to a jury trial, most notably perhaps are military trials.

This case will likely pose some difficult factual issues, particularly in the face of what appears to be a factual dispute concerning the cause of the two infants' death. The overarching concern is, of course, that the juvenile receive a fair adjudication in the juvenile's best interest. These proceedings will be delicate and the court is not convinced that the larger venue of a jury trial will further the juvenile's best interests or make for a more fair adjudication of the issues. The decision in *McKeiver v. Pennsylvania*, 403 U.S. at 528, may only have been a plurality decision and may be subject to reconsideration, but it is still a binding pronouncement by the Supreme Court on the issue. The court therefore concludes that D.F. does not have a constitutional right to a jury trial. It is Judge Stadtmueller's province to decide whether he might otherwise be amenable to the use of a jury, and D.F.'s motion for a jury trial is therefore denied, without prejudice.

Motion for Notice of Uncharged Misconduct

D.F. seeks reasonable notice of any uncharged misconduct which the government intends to introduce at her delinquency hearing. The government agrees to provide reasonable notice and the motion is therefore denied as moot.

IT IS THEREFORE ORDERED that:

1. D.F.'s motion for a jury trial is denied, without prejudice, D.F. may renew her motion before Judge Stadtmueller.

2. D.F.'s motion for notice of uncharged misconduct evidence is denied as moot.

IT IS THEREFORE RECOMMENDED that D.F.'s motion to suppress evidence be granted, and her statements made in the course of psychotherapy be suppressed.

Any objection to this order and recommendation must be filed with the Clerk of Court in duplicate prior to the final prehearing conference, which is scheduled to be held April 20, 1994. Failure to file an objection within the specified time waives the right to appeal the district court's order on all factual and legal issues.

Dated at Milwaukee, Wisconsin, this *13th* day of April, 1994.

/s/ AARON E. GOODSTEIN
AARON E. GOODSTEIN
U.S. MAGISTRATE JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 94-2900
No. 93 CR 202
J. P. Stadtmueller, Judge

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

D.F., DEFENDANT-APPELLEE

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

[FILED: NOV. 17, 1995]

ORDER

Before: Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. ROBERT L. MILLER, District Judge*

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on October 10, 1995 by the plaintiff-appellant, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition. Accordingly,

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* The Honorable Robert L. Miller, District Judge for the Northern District of Indiana, sitting by designation.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED